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IN SUPREME COURT, STATE OF WISCONSIN

JANUARY TERM, 1940

No. 98

WILLIAM D. VAN DYKE, JR., AND DOUGLASS VAN DYKE, AS TRUSTEES UNDER TRUST AGREEMENT DATED DECEMBER 6, 1935, *Appellants,*

vs.

WISCONSIN TAX COMMISSION, JOHN H. LEENHOUTS, ASSESSOR OF INCOMES OF MILWAUKEE COUNTY, STATE OF WISCONSIN; WISCONSIN DEPARTMENT OF TAXATION, AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN, *Respondents,*

JURISDICTIONAL STATEMENT.

Appellants present with their petition for the allowance of an appeal to the Supreme Court of the United States, from the judgment of this Court entered on the 4th day of June, 1940, the following separate statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal, to review the judgment in question.

(a) The statutory provisions believed to sustain the jurisdiction are Section 344 (Judicial Code, Section 237

amended) of Title 28 of United States Code Annotated, and specifically that part of said section which provides:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of the statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

Section 861a, Title 28, United States Code Annotated:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall thereafter be obtainable by appeal."

Section 861b,Title 28, United States Code Annotated:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

(b) The Statute of the State of Wisconsin, the validity of which is involved, is Section 4, Chapter 363, Wisconsin Session Laws of 1933, which is set forth at pages 795-800, of said Session Laws, as amended, to extend the time of the operation of the law to July 1, 1937, by Section 7, Chapter 15, Wisconsin Session Laws of 1935, as set forth at page 30 of said Session Laws.

The pertinent provisions of the statute, as amended, are as follows:

> SECTION 4. Emergency Gift Tax.—(1) An emergency tax is imposed upon transfers of property, real, per-

sonal or mixed, or any interests therein or income therefrom in trust or otherwise, to any person, association or corporation, which are made subsequent to the effective date of this act and prior to July 1, 1937, in the following cases, except as hereinafter provided:

(a) When the transfer is by gift from any person who at the date of such gift was a resident of the state.

(b) When the transfer is by gift of property within the state or within its jurisdiction and the donor was a non-resident of the state at the date of such gift.

(c) No tax shall be imposed upon the transfer of any property which is taxable under the inheritance tax law of this state, and any tax paid upon the transfer of any property under the provisions of this section may be and no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily.

(2) (a) If the transfer is made in property, the clear market value thereof at the date of the gift shall be considered the taxable value of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the clear market value of the property exceeded the consideration received shall, for the purposes of the tax imposed by this chapter, be deemed a gift and shall be included in computing the amount of gifts made during the year.

(b) All transfers to the same donee by the same donor within the same calendar year shall be added together and the aggregate of such transfers shall be considered as one transfer for the purposes of taxation under this chapter, and the rates of tax hereinafter prescribed shall be applied to the aggregate of such transfers made within the same calendar year.

The remainder of the statute is summarized as follows: The rates are graduated according to kinship, and are

progressive in accordance with the amount given to the same donee.

Gifts to certain municipal and charitable institutions are exempt.

Personal exemptions are allowed to each donee in variable amounts depending on kinship and the amount of the gifts.

Donor and donee must each file a return, and the assessment is made by the Assessor of Incomes of the assessment district in which the donee resides.

(c) The date of the judgment sought to be reversed is June 4, 1940, and the date upon which the application for appeal is presented is June 20, 1940.

(d) The gift taxed was made at Chicago, Illinois, by a resident of Wisconsin to residents of Wisconsin, in trust for residents of Wisconsin, by actual delivery at Chicago, Illinois, of silver dollars.

In the suit there was drawn in question the validity of said Emergency Gift Tax Act on the ground that it was repugnant to Section 1 of the XIV Amendment to the Constitution of the United States if construed and applied as imposing the tax on such transfer of silver dollars, because the State of Wisconsin lacked jurisdiction to tax such transfer, and to do so would deprive appellants of property without due process of law.

The decision of the Supreme Court of the State of Wisconsin, which is the highest court of the State in which a decision in the suit could be had, was in favor of the validity of said statute construed as imposing the tax on such gift.

Such decision brings the case within the jurisdictional provisions relied on as held in *Frick* v. *Pennsylvania*, 268 U. S. 473, at page 501.

(e) The questions involved on this appeal are substantial, because:

The question presented by this appeal is the basis of jurisdiction, if any, for a State to impose a gift tax on a transfer, by gift or for an inadequate consideration, completely consummated in another State.

Appellants contend that jurisdiction to impose a gift tax is the same as jurisdiction to impose a sales tax, stock transfer tax, or other similar tax imposed upon the exercise of a right or privilege in a State selected by the parties, and that such State has exclusive jurisdiction to impose such a tax, irrespective of the domicil of the parties and whether or not the property transferred is merely within such State temporarily.

Jurisdiction to impose an annual property tax is not analogous. Such tax is not imposed in respect to a single event, but for the protection ordinarily afforded during the year by the State of domicil of the owner, and such State, rather than several States in each of which the property might be temporarily located during the year, rightfully imposes the tax.

Jurisdiction to impose an inheritance or estate tax in respect to a gift made in contemplation of death is not analogous, because the basis of such jurisdiction is not jurisdiction of the gift, but jurisdiction of the estate of the decedent, with the right to condition the succession thereto on payment of a tax measured by the gift, even though made in another State, provided, that, looking through form to substance the condition is reasonable when viewed in the light of the effect of the gift and the circumstances surrounding the making thereof.

We know of no case as yet considered by the Supreme Court of the United States which involves the jurisdiction of a State to impose a gift tax on an ordinary gift *inter vivos*, completely consummated in another State, nor any

case in which jurisdiction to tax is predicated not on actualities, but on the assumed substance of the transaction.

(f) The Federal question sought to be reviewed was raised by appellants at the outset in a rider attached to their gift tax return, and in the protest, after the assessment, to the Milwaukee County Board of Review, both documents being incorporated in the record made before such Board of Review.

The Wisconsin Tax Commission reviewed the record and affirmed the assessment.

Appellants, in order to obtain court review of the assessment, were required by the statute to specify their objections to the assessment and their assignments of error.

Appellants, in their appeal to the Circuit Court of Milwaukee County, Wisconsin, specified their objections as follows:

> "(2) If said Act is construed as imposing a tax on this gift it would deprive appellants and the beneficiaries whom they represent of property without due process of law, contrary to the XIV Amendment to the Constitution of the United States:
>
> (a) Because Wisconsin has no jurisdiction to impose a gift tax either upon the donor or donees in respect of a gift made in Illinois of tangible personal property there located."

and assigned as error that

> "(2) In holding that said statute so construed would be constitutional and not void by reason of the lack of jurisdiction of Wisconsin to impose a gift tax on such transaction."

The Circuit Court for Milwaukee County, Wisconsin, affirmed the assessment in a decision which discusses this question.

Appellants, in their appeal to this Court, made the following assignments of error in their brief:

> "(2) The Act, if construed as imposing gift taxes upon these transfers, is unconstitutional because:
>
> (a) The State of Wisconsin lacks jurisdiction to impose gift taxes upon gifts *inter vivos* made without the state;"

This assignment of error is more clearly stated in the brief as follows:

> "The Gift Tax Act, if construed contrary to its express terms, as imposing a gift tax on such transfers without the State would be invalid because such a tax would deprive the taxpayer of property without due process of law as prohibited by the XIV Amendment to the Constitution of the United States."

The assessment was affirmed by the Supreme Court of the State of Wisconsin in its decision, a copy of which is hereto attached as Exhibit "A", in which decision the facts are clearly set forth.

Dated, Milwaukee, Wisconsin, June 20th, 1940.

DOUGLASS VAN DYKE,
Attorney for Appellants.

EXHIBIT "A".

IN SUPREME COURT, STATE OF WISCONSIN.

JANUARY TERM, 1940.

Nos. 98 and 99.

No. 98.

WILLIAM B. VAN DYKE, JR., *et al.*, Trustees under Trust Agreement Dated December 6, 1935, *Appellants*,

vs.

WISCONSIN TAX COMMISSION *et al.*, *Respondents*.

No. 99.

FIRST WISCONSIN TRUST CO., Trustee under Trust Agreement Dated December 6, 1935, *Appellant*,

vs.

WISCONSIN TAX COMMISSION *et al.*, *Respondents*.

Appeals from judgments of the circuit court for Milwaukee county. Charles L. Aarons, Circuit Judge, presiding. *Affirmed.*

These actions were begun by plaintiffs on the 14th day of December, 1938, by the service of a notice of appeal from the determination of the Wisconsin Tax Commission dated November 30, 1938. The assessment of taxes involved made by the Wisconsin Tax Commission was confirmed by judgment entered on December 15, 1939, from which the plaintiffs in each case appeal.

The facts will be stated in the opinion.

ROSENBERRY, *C. J.*:

George D. Van Dyke, a citizen of the United States, residing at Milwaukee, desired to create two trusts. He was the owner of United States first liberty loan 3½% gold bonds of the par value of $270,000. He had intended transferring

the bonds. Before any positive steps were taken, the bonds were called. Having ascertained on November 15, 1935, that he could collect the bonds in silver dollars, he went to Chicago on November 25, 1935, taking the bonds with him and appointed the First National Bank of Chicago his agent. Desiring to receive payment of the bonds in silver dollars he was advised that they were not at hand but on December 3, 1935, he was notified that the silver dollars had been shipped to the Federal Reserve Bank at Chicago. On December 6, 1935, accompanied by his son, Douglass Van Dyke, who took with him a power of attorney from William D. Van Dyke, Jr., he went to Chicago where he met George B. Luhman of the First Wisconsin Trust Company of Milwaukee at the First National Bank of Chicago. The trust instruments were then executed in the presence of the officer of the First National Bank of Chicago with the exception of the signature of William D. Van Dyke, Jr., who had previously executed the instrument as one of the trustees at Milwaukee. George B. Van Dyke being informed that the silver dollars were in the private vaults of the First National Bank at the Federal Reserve Bank of Chicago, went with Mr. Luhman and Mr. Douglass Van Dyke to the Federal Reserve Bank where 270,000 silver dollars were delivered to George D. Van Dyke. Thereupon he delivered 135,000 of said silver dollars to Mr. Luhman on behalf of the First Wisconsin Trust Company and 135,000 silver dollars to Douglass Van Dyke, Trustee, and took receipts therefor from the trustees.

The donor, George D. Van Dyke, never had any intention of bringing the silver dollars to Wisconsin as they weighed approximately seven and one-half tons. There was no attempt at secrecy or evasion in the transaction and the trust instruments expressly provided that full disclosure should be made to the taxing authorities of the state of Wisconsin.

The First Wisconsin Trust Company delivered the 135,000 silver dollars to the First National Bank of Chicago and at its request they were credited to the account of the First Wisconsin National Bank of Milwaukee which bank thereupon credited the account of the First Wisconsin

Trust Company. Douglass Van Dyke on the same day delivered the 135,000 silver dollars which he received, with the request that it open an account in the name of Douglass Van Dyke and William D. Van Dyke, Jr., Trustees. The fund remained there until two days after Christmas when the trustees bought $10,000 par United States Savings bonds for $7,500. They completed their investments about the middle of April, 1936, at which time they opened an account in the Marine National Exchange Bank of Milwaukee and transferred $3,000 or $4,000 of said amount to that bank. Douglass Van Dyke and William D. Van Dyke, Jr., Trustees, are both residents of Milwaukee and the First Wisconsin Trust Company, the trustee of the other trust, is a Wisconsin corporation located at Milwaukee, Wisconsin.

The trust agreement under which William D. Van Dyke, Jr., and Douglass Van Dyke are trustees was created for the purpose of giving to the donor's only grandchild a broader education and more liberal support and maintenance than it is the legal duty of her parents to provide or within their financial ability to supply. The beneficiary of the trust is Louise Lawrence Van Dyke, the minor granddaughter of the donor and upon her death the remainder to her lawful issue, per stirpes, or if she leaves no issue then to Douglass Van Dyke, or if he is not then living, to his wife surviving, or if no wife survives him, then to the heirs at law of George D. Van Dyke.

The trust agreement under which the First Wisconsin Trust Company is trustee was created primarily for the support and education of the four foster children of Louise V. Hauxhurst who, however, take no interest in the trust, the income to be disbursed at the direction of Louise V. Hauxhurst, or in case of her death by a successor named in the trust instrument. On the death of all of the children the balance of the trust estate, if any, is payable to Louise Van Dyke Hauxhurst, if living, or if she is deceased, to such persons as she shall have appointed by her last will and testament, and in default of such appointment to the heirs at law of George D. Van Dyke. The donor reserved no interest in or control of any kind or character over the trusts.

The plaintiff trustees made donees' returns to the proper taxing officers, attaching copies of the trust agreements and protesting that the transfers were not subject to the Wisconsin gift tax. The First Wisconsin Trust Company filed a donee's gift tax report on March 19, 1936. Douglass Van Dyke and William D. Van Dyke, Jr., filed a donee's gift tax report on March 10, 1936. J. H. Leenhouts, assessor of incomes, notified the plaintiffs trustees that the gifts were subject to a tax under the laws of Wisconsin and that taxes would be certified for collection unless within twenty days a written protest was filed in his office. Protests were filed, proceedings were had before the county board of review and the matter was brought before the Wisconsin Tax Commission, which entered an order confirming the assessment. The matter was then appealed to the circuit court where judgment affirming the assessment was entered on December 15, 1939.

The plaintiffs trustees allege that the judgment in each case is erroneous for the following reasons:

"(1st) The emergency gift tax by its express terms imposes no gift tax upon these transfers of tangible personal property located without this state, which said property was not without this state temporarily.

(2nd) The Act, if construed as imposing gift taxes upon these transfers, is unconstitutional because:

(a) The State of Wisconsin lacks jurisdiction to impose gift taxes upon gifts *inter vivos* made without the state;

(b) The classifications and progressive rates are invalid as applied to taxes on gifts *inter vivos* not made in contemplation of death;

(c) The State of Wisconsin may not impose a tax upon the transfer *inter vivos* of money coined in the United States.

(3rd) The assessments are void because against the trustees personally as donees, instead of against the beneficiaries. The assessments are incomplete because the amounts payable have not been computed."

The state of Wisconsin claims the right to levy a tax upon the gifts in question by virtue of sec. 4, ch. 363 of the Laws of 1933, as amended. The pertinent provisions of sec. 4 are as follows:

"Emergency gift tax. (1) An emergency tax is imposed upon transfers of property, real, personal or mixed, or any interests therein or income therefrom in trust or otherwise, to any person, association or corporation, which are made subsequent to the effective date of this act and prior to July 1, 1935, in the following cases, except as hereinafter provided:

(a) When the transfer is by gift from any person who at the date of such gift was a resident of the state.

(b) When the transfer is by gift of property within the state or within its jurisdiction and the donor was a non-resident of the state at the date of such gift.

(c) No tax shall be imposed upon the transfer of any property which is taxable under the inheritance tax law of this state, and any tax paid upon the transfer of any property under the provisions of this section may be applied as a credit upon any inheritance tax which may be imposed under the inheritance tax law upon the same transfer, *and no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily.*"

Under the inheritance tax act gifts made in contemplation of death are regarded as a part of the estate of the deceased and taxed accordingly.

The plaintiff trustees contend that what the donor gave was silver dollars; that silver dollars are tangible personal property; that they were never within the state of Wisconsin nor did the donor ever have any intention to bring the silver dollars within the state; that the gift was not taxable therefore because within the express language of the exception contained in subsec. (c).

On behalf of the tax commission it is claimed that this case is ruled by *Pearson v. McGraw*, — U. S. —, 84 L. Ed.

139, decided Dec. 4, 1939. The circuit court did not have the benefit of this decision but reached the same conclusion. Briefly stated the facts in *Pearson v. McGraw* are as follows: one Hayes while a resident of the middle west, placed various intangibles in the possession of an Illinois trust company as agent. Hayes established a domicile in Oregon but he continued to have the Illinois trust company retain the intangibles as agent, with the result that the intangibles were always physically present in Illinois. On August 8, 1935, six months before his death, Hayes directed the Illinois trust company to liquidate an amount of the intangibles sufficient to procure $450,000 and purchase therewith as his agent federal reserve notes of the face amount of $450,000. A few days prior to August 15, 1935, the trust company purchased $450,000 of federal reserve notes. On August 15, 1935, Hayes executed in Oregon a trust agreement under which the Illinois trust company was designated as trustee and by which the decedent transferred to it as trustee the federal reserve notes in trust for the benefit of certain beneficiaries. The trust was irrevocable and decedent retained no interest or power whatsoever in respect to it. The trust company held the federal reserve notes under the trust agreement for about five days and then used the federal reserve notes to purchase bonds and other intangibles. Hayes died in 1936, at which time he was domiciled in Oregon. Oregon imposed a tax upon the transfer of the property as a transfer made by the decedent "in contemplation of death." The Supreme Court of Oregon held that the state was without jurisdiction to tax because neither the securities nor the cash used to purchase the federal reserve notes or the notes themselves were ever in Oregon but always in Illinois. The Oregon court held that the intangibles would have been taxable in Oregon under the facts of the case but in reliance on *Blodgett v. Silberman*, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410, concluded that the federal reserve notes were tangibles and for that reason not taxable in Oregon. If Hayes had caused his agent to purchase silver dollars instead of federal reserve notes, the facts in *Pearson v. McGraw* with the exception of some immaterial details, would have been exactly parallel with

the facts in this case. There would have been a transfer of tangibles made without the state of property that was not temporarily absent from the state. The Supreme Court of The United States, in disposing of the matter said:

"On the facts of this case we believe that the various steps in the series must be considered as constituting but one integrated and indivisible transaction—a transfer by decedent of intangibles in contemplation of death. And we reach this result though each step in the series was real and though none was camouflaged or concealed. For basically the sale of intangibles, the acquisition of federal reserve notes, and their transfer under the agreement of August 15, 1935, were interdependent. (Citing cases.) From decedent's point of view, completion of the series of steps was necessary for consummation of his program to utilize $450,000 of his estate to provide for certain designated members of his family. Any step short of the final transfer would not have done it. The mere sale of the intangibles and the acquisition of the federal reserve notes had no functional or business significance apart from the August 15, 1935, transfer. That is emphasized here because they created no legal relations and gave rise to no vested rights interfering with decedent's continuing power of disposition. Taken as isolated transactions, they have meaning and significance only in relation to the third step, a conclusion made especially evident by the close sequence of events. Hence, it is no answer to say that because the first two steps were not irrevocable but could be recalled, the third step was not a necessary one in the series. For that is as immaterial as is the revocability of any donor's plan to make a gift in contemplation of death at any moment prior to its consummation. Admittedly decedent had such a purpose on the transfer of the notes. To hold that such purpose was not present on the sale of the intangibles would be to isolate one part of the total transaction and to give it significance and meaning utterly inconsistent with the fact that the intangibles were sold for the purpose of acquiring the notes which, in turn, were to be placed under an irrevocable trust. Therefore we need not consider the nature of federal reserve notes, for in that posture of the

case their taxability as such and in isolation from the whole transaction is not in issue.

"Hence to hold that there is a constitutional barrier to the tax sought to be imposed would be to make a fetish of form. It would make the principles of the decisions of this Court on the constitutional power to tax devoid of any reason or function apart from a ritual of tax avoidance."

Mr. Justice Stone concurred in the reversal but he was of the opinion that there is nothing in the constitution to compel a state to treat federal reserve notes for tax purposes as chattels were treated in *Frick v. Pennsylvania*, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, 42 A. L. R. 316.

This seems to be an intimation that under *Blodgett v. Silberman, supra,* federal reserve notes are not to be regarded as tangibles so far as taxation is concerned. The plaintiffs trustees while commenting on some differences between the facts of this case and the facts in the Oregon case, contend that *Pearson v. McGraw, supra,* has little if any application to the taxation of a gift *inter vivos* made by actual delivery of tangible property in another state and contend that the jurisdiction of the state of domicile of a decedent to impose an inheritance tax in respect to a gift made in contemplation of death is far broader than its jurisdiction to tax one of its residents in respect to a gift *inter vivos* or a sale made by him. This contention ignores the rationale of the decision in *Pearson v. McGraw.* The court held that the transaction was in fact an exchange of intangibles for intangibles. The fact that in the process of making the exchange the settlor acquired tangibles was ignored because it had no real relation to the carrying out of the settlor's object.

Plaintiff appellants contend that Wisconsin has no jurisdiction to tax the transfer in this case because it occurred in another state. It is true that title to a chattel passes according to the law of the place where the chattel was at the time the transaction which passed the title, occurred 2nd Conflict of Laws, Beale, p. 981. The argument is that what was transferred was silver dollars; that the silver dollars were at the time of the transfer in the state of Illinois, con-

sequently Wisconsin has no jurisdiction to tax the transfer. This contention requires us to analyze a little more closely what happened under the facts of this case. The donor, domiciled in Wisconsin, desired to create a trust for the benefit of other Wisconsin residents. The trust res was to be the liberty bonds held by him or their proceeds. From the income to be derived from the investment by the trustees designated beneficiaries were to be supported and the title to the trust res ultimately transferred to certain designated persons all of whom are residents of Wisconsin. In order to carry out this plan, the donor conceived the idea of procuring seven and one-half tons of silver dollars in the city of Chicago, proceeds of the liberty bonds, going with his trustees to Chicago and there delivering the silver dollars to them. Upon the delivery of the silver dollars the trustees promptly exchanged them for bank credits, securities were purchased and the execution of the trust proceeded with. The plaintiff appellants contend that although they received a gift in trust, that gift is not taxable because it reached their hands by way of a transfer of tangible property, that is, silver dollars, in the state of Illinois.

In disposing of this matter, the trial court said:

"It is incumbent on the court to view the transaction in the instant case in the light of what was really intended to be accomplished, and in the light of the absence of any real function or utility on the part of the silver dollars in connection with the consummation of the gift. For here the true purpose, as expressed in the trust agreements, and as disclosed by the acts of the donor and the trustees, was to convert intangible personal property of one kind (U. S. bonds) into another kind of intangible personal property (bank credits and investments in stocks, bonds or other securities) using in the intermediate steps of the process the acquisition of tangible property (silver dollars) as a device which possessed no utility in the making of the transfer."

It is considered that this conclusion of the trial court is strictly within the reasoning of the United States Supreme Court in *Pearson* v. *McGraw, supra.* In *Pearson* v. *McGraw* as in this case the real purpose of the donor was to ex-

change intangibles for intangibles. The court did not give effect to the purchase of federal reserve notes standing by itself nor consider whether they were tangibles or intangibles because it considered as the trial court in this case considered, that the transaction was an integrated and indivisible one.

It is considered that the tax must be upheld for the reason that at the time of the transfer the situs of the silver dollars for the purposes of taxation was within the state of Wisconsin. The silver dollars were the tangible personal property of a Wisconsin resident but they were not "located" without the state. The word "located" as used in this statute clearly refers to situs and not to mere physical presence. Property that is temporarily without the state is not exempted because its situs is still within the state of Wisconsin. When it is taken from the state permanently it is "located" elsewhere. It was for many years a general rule that chattels were taxable at the domicile of the owner on the ground that the application of the maxim, *mobilius sequuntur personam*, made them taxable there. *McKeen* v. *County of North Hampton* (1865), 49 Pa. 519, 1 Beale Conflict of Laws, p. 546, 2nd Cooley Taxation, p. 955, sec. 440.

The donor went to Chicago on November 22, 1935, having with him bonds of the par value of $270,000. He selected his agent, First National Bank of Chicago, to collect the bonds in silver coins of the United States. He was notified on December 3, 1935, that the silver dollars were in Chicago and on December 6, 1935, the silver dollars were delivered to him. On the same day he in turn delivered them to the trustees. The First Wisconsin Trust Company of Milwaukee on the same day delivered the silver dollars received by it to the bank and received for them bank credit which was transferred to the First Wisconsin National Bank of Milwaukee. By the middle of April, 1936, Douglass Van Dyke and William D. Van Dyke, Jr., had completed the investment of the bank credit which they received and transferred $3,000 or $4,000 to their bank account at the Marine National Exchange Bank of Milwaukee. Assuming that the silver dollars were tangible personal property the

law attributes to them a situs which in the absence of any other fact is the domicile of the owner. Down to the time of their delivery to the donor or his agent, the silver dollars were the property of the United States and as such had no situs for taxation either in Chicago or elsewhere. By delivery to the donor or his agent, the silver dollars acquired a situs at the domicile of the new owner which was within the state of Wisconsin. If a citizen acquires tangible personal property permanently located in another state such as a stock of goods kept for sale, the maxim would not apply. It is said in the text books on the authority of *Metropolitan Life Ins. Co. of New York* v. *New Orleans*, 205 U. S. 395, and other cases, the fiction that personal property follows the domicile of its owner cannot be allowed to obscure the truth, applies to taxation. Its application in this case reveals instead of obscuring the truth. The situs of personal property for the purposes of taxation is the domicile of the owner unless the property has acquired an actual situs of its own in a state or place other than that where the owner is domiciled. Cooley on Taxation, secs. 440-451. See *Hutchinson* v. *Ross* (—), 262 N. Y. 381.

Since *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, it has been universally held that the state of domicile may not tax tangible property to its citizen located permanently in another state because it has no situs in the taxing state. The question for decision in that case was stated by Mr. Justice Brown thus:

"In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, permanently located in other States, and employed there in the prosecution of its business."

The property sought to be taxed by the state of Kentucky was refrigerator cars which were in use and located in other states, and it was held that cars so located and employed in other states, were not subject to the taxing power of Kentucky.

It is considered that the word "located" as used in sec. 4 of the Emergency Gift Tax Act is intended to exempt

from the operation of the section tangible personal property of a resident of Wisconsin which has acquired a situs without the state. To make this doubly sure the legislature annexed a proviso that it should not escape the tax if it was only temporarily without the state, meaning thereby that it should not be exempt if it had not acquired a situs for taxation without the state of Wisconsin.

While it may be said that the silver dollars were never within the state and therefore could not be temporarily without it, it is considered too artificial a construction to place upon the language of the act. In legal effect the situation is the same as if the donor had carried with him the silver dollars to Chicago and there delivered them to the trustees. It is true he did not receive title to them while he was still within the state of Wisconsin but at all times he was domiciled within the state, and the situs of the silver dollars for taxation purposes was referable to his domicile so in contemplation of law their situs when he received title was in Wisconsin although they and he were physically present in Chicago when he delivered them to the trustees. We think it is plain that the legislature intended to exempt from the operation of the section only such personal property as has acquired a situs without the state and is delivered there.

The plaintiff trustees argue that it was never the intention of the donor to bring the silver dollars to Wisconsin. That is clear from the statement of facts. He intended to dispose of them at once to the trustees who were in turn to exchange them for intangibles. Under the facts of this case his intent not to bring the silver dollars to Wisconsin is without legal significance.

The plaintiff trustees also contend that a transfer of silver dollars by gift *inter vivos* is immune from the Wisconsin gift tax and Wisconsin has no power to tax directly or indirectly the national currency. The gift tax is not a tax upon property, *Bromley* v. *McCaughn* (1929), 280 U. S. 124, 74 L. ed. 226. It has been said that statutes imposing a gift tax and those imposing an estate tax are in *pari materia* and must be construed together, *Burnet* v. *Guggenheim* (1933), 288 U. S. 280. Mr. Justice Brandeis

in a dissenting opinion in *Untermyer* v. *Anderson* (1928), 276 U. S. 440, said:

"The gift tax was imposed largely to prevent evasion of the estate tax by gifts *inter vivos*, and evasion of the income tax by the splitting up of fortunes and the consequent diminution of surtaxes."

For history and basis of gift taxes, see dissenting opinion *Heiner* v. *Donnan* (—), 285 U. S. 312.

It is considered that the authorities do not sustain the plaintiff trustees contention on that point.

In the consideration of the issues in this case we have assumed that silver dollars are tangible personal property. There are intimations in the authorities which arouse robust doubt in our minds as to the correctness of this assumption. While circulating as a medium of exchange, not being an integrated part of the property or wealth of any particular jurisdiction and having a use or function entirely apart from any intrinsic value it may have, coin may well lose its character as a "tangible." It was the mobility of money, precious metals and jewels that originally led to the adoption of the maxim "mobilius sequunter personam." Being easily secreted it was held that its situs was that of the domicile of the owner. *Pullman's Palace Car Co.* v. *Pennsylvania* (1890), 141 U. S. 18, at 22. See note 62 Am. St. Rpts. 448. We have not found it necessary to reach a decision of this question and make this comment for the purpose of expressly reserving the question.

By the Court.—The judgment in each case is affirmed.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Number .....

William D. Van Dyke, Jr., and *Douglass Van Dyke*, as Trustees, under Trust Agreement dated December 6, 1935,

Appellants,

vs.

Wisconsin Tax Commission; John H. Leenhouts, Assessor of Incomes of Milwaukee County; *State of Wisconsin; Wisconsin Department of Taxation;* and *Elmer E. Barlow*, as Commissioner of Taxation of the State of Wisconsin,

Appellees.

Appeal from Judgment
of the Supreme Court of the State of Wisconsin.

Appellants' Brief
Opposing Appellees' Motion to Dismiss or Affirm.

Pursuant to paragraph 3 of Rule 2 of the Rules of the United States Supreme Court, appellants file this brief opposing appellees' motion to dismiss or affirm.

Nature of the Case.

This appeal is from a judgment of the Supreme Court of the State of Wisconsin, entered June 4, 1940, affirming an assessment of a gift tax imposed by the statutes of Wisconsin.

This suit was consolidated for hearing before the Income Tax Board of Review with a suit involving a similar gift, by the same donor at the same time, and heard by the Circuit Court for Milwaukee County and by the Supreme Court of Wisconsin on a combined record.

The questions of law in both cases are identical, and the argument in this brief is identical with the argument in the brief in the companion case.

A separate assessment was made, and a separate judgment was entered in each case.

Appeals to this court were allowed by the Chief Justice of the Supreme Court of the State of Wisconsin, on June 20, 1940, in both cases.

The ground for invoking jurisdiction of this Court was that imposition of the tax violated the XIV Amendment to the Constitution of the United States, because imposed without jurisdiction.

The motion to dismiss the appeal, or affirm the judgment, raises the question of whether a substantial federal question is presented, on which question this brief is submitted.

Reference to Official Report of Opinion.

The opinion in this suit (R. pp. 145-160), of the Supreme Court of the State of Wisconsin, which is the highest court of said State in which a decision in the suit could be had, is reported in 235 Wisconsin Reports 128, as appears from the advance sheets—the bound volume not having been

published as yet. It also appears in the advance sheets of the Northwestern Reporter, Volume 292 N. W. Rep. 313.

The opinion of the Circuit Court for Milwaukee County is not published. It appears at R. pp. 124-140.

Grounds on Which Jurisdiction of This Court is Invoked.

The date of the judgment of the Supreme Court of the State of Wisconsin sought to be reversed is June 4, 1940, and the date upon which the appeal to this court was allowed by the Chief Justice of the Supreme Court of the State of Wisconsin, is June 20, 1940.

The statutory provisions believed to sustain the jurisdiction are Section 344 (Judicial Code, Section 237 amended), Section 861a and Section 861b, Title 28 U. S. Code Annotated.

The precise ground on which jurisdiction of this Court is invoked is that in this suit there was drawn in question the validity of Section 4 of Chapter 363, Wisconsin Laws of 1933, pages 795 to 800 as amended to extend the time of the operation of the Law to July 1, 1937, by Section 7, Chapter 15, Wisconsin Laws of 1935, page 30, imposing an emergency gift tax, on the ground that said statute was repugnant to section 1 of the XIV Amendment to the Constitution of the United States, if construed and applied as imposing the tax on a gift of silver dollars made by delivery thereof in the State of Illinois, by a resident of the State of Wisconsin, because the State of Wisconsin lacked jurisdiction to tax such gift, and to do so would deprive appellants of property without due process of law.

The decision and judgment of the Supreme Court of the State of Wisconsin, which is the highest court of said state in which a decision in the suit could be had, was in favor

of the validity of said statute construed as imposing the tax on such gift.

Jurisdiction of the appeal is sustained by *Frick vs. Pennsylvania*, 268 U. S. 473, at 501, 69 L. Ed. 1058, 45 S. Ct. 603.

The motion to dismiss the appeal or affirm the judgment challenges the substantial nature of the federal question involved. The substantial nature of this question is hereinafter discussed.

Statement of Case.

Substantially all the facts are set forth in an affidavit by George D. Van Dyke, R. pp. 102-108, attached as Exhibit "B" to the objections to the assessments, Exhibits 2a and 2b admitted R. p. 83, which affidavit he testified contained the facts (R. p. 82).

References to the affidavit are designated by the letter B following the page number.

George D. Van Dyke, a citizen of the United States, residing at Milwaukee, Wisconsin (R. p. 82, 102 B), and a lawyer by profession, made two gifts each of 135,000 silver dollars, at Chicago, Illinois, on December 6, 1935 (R. p. 102 B).

He had previously owned United States First Liberty 3 1/2% gold bonds of the par value of $270,000, of which bonds of the par value of $220,000 were registered in his name (R. pp. 102-103 B).

Said bonds, by their terms, were exempt from taxation, except estate and inheritance taxes (R. p. 103 B).

He had contemplated testing the right of Wisconsin and of the United States to impose a gift tax on the transfer of these bonds (R. p. 104 B).

The bonds, however, were called for redemption as of June 15, 1935, to be presented for payment at the Treasury of the United States, or a Federal Reserve Bank or branch (R. p. 104 B). Other banks were not agents of the United States for this purpose (R. pp. 104-105 B, Exhibit 1b, R. pp. 83, 95, 96).

He did not care at his own risk to use a Milwaukee bank as his agent and obtain a large credit at such bank, pending reinvestment (R. p. 105 B). Moreover, he saw no opportunity to invest in similar tax-exempt securities, and the income of taxable securities would fall in the higher brackets and greatly increase his income taxes (R. p. 105 B).

He continued to hold the bonds until November 15, 1935, while investigating the right of the government to call the bonds for payment in a depreciated currency, instead of gold (R. p. 104 B).

He then saw in the situation an opportunity to make the gifts which he had had in contemplation, and test some of the legal questions which he desired to raise, because he had always resisted extensions of the taxing power beyond constitutional or jurisdictional limitations (R. p. 105 B).

He ascertained on November 15, 1935, that he could collect the bonds in silver dollars (R. p. 105 B).

On November 22, 1935, he delivered the bonds to the First National Bank of Chicago, as his agent, for collection in silver dollars, at the Federal Reserve Bank at Chicago, which is the nearest Federal Reserve Bank or branch to the State of Wisconsin (R. p. 105 B). The Federal Reserve Bank did not then have on hand the requisite number of silver dollars (R. p. 105 B). On December 3, 1935, he received a notification of the receipt of the silver dollars at Chicago, Illinois (R. pp. 105-106 B).

On December 6, 1935, the said George D. Van Dyke, accompanied by his son, Douglass Van Dyke, who took with

him a power of attorney from William D. Van Dyke, Jr., went to Chicago where they met Mr. George Luhman, President of the First Wisconsin Trust Company of Milwaukee, Wisconsin, at the First National Bank of Chicago (R. p. 106 B).

Two trust instruments were then executed in the presence of officers of the First National Bank of Chicago, with the exception of the signature of William D. Van Dyke, Jr., who had previously executed one of the trust instruments as a trustee, at Milwaukee, Wisconsin (R. p. 106 B).

The trust agreement under which William D. Van Dyke, Jr. and Douglass Van Dyke are trustees, was created for the purpose of giving to Louise Lawrence Van Dyke, the only grandchild of George D. Van Dyke, a broader education and more liberal support and maintenance than it is the legal duty of her parents to provide, or within their financial ability to support. Upon her death the remainder is distributable to her lawful issue, per stirpes, or if she leaves no issue, then to Douglass Van Dyke, or if he is not then living, then to his wife surviving, or if no wife survives him, then to the heirs at law of George D. Van Dyke (Exhibit 3a, R. p. 84; 109 at 111-114).

George D. Van Dyke reserved no interest in or control of any kind or character over the trusts (R. p. 107 B).

He never had the slightest intent of bringing the silver dollars to Wisconsin (R. p. 107 B).

The trustees were not authorized to take the silver dollars to Wisconsin (Exhibit 3a, R. p. 84; 110).

In both trust agreements the trustees were directed to make full disclosure to the taxing authorities of the State of Wisconsin, and in their discretion to contest and litigate at the expense of the trust estates, any gift tax liability sought to be imposed in respect to said gifts (R. p. 108 B).

The parties then went to the Federal Reserve Bank at Chicago, Illinois, where the silver dollars were stored in private vaults of the First National Bank of Chicago (R. p. 106 B).

George D. Van Dyke receipted to the First National Bank of Chicago for the silver dollars, and delivered 135,000 silver dollars to Douglass Van Dyke, trustee, who receipted for the same on behalf of himself as trustee, and his co-trustee, William D. Van Dyke, Jr., for whom he acted under a power of attorney (R. p. 107 B).

George D. Van Dyke then delivered 135,000 silver dollars to Mr. Luhman, as President of the First Wisconsin Trust Company, who receipted for the same on behalf of said First Wisconsin Trust Company, as trustee (R. p. 107 B).

On the same day the First Wisconsin Trust Company delivered the 135,000 silver dollars to the First National Bank of Chicago, and at its request said amount was credited to the account of the First Wisconsin National Bank of Milwaukee, which bank credited the account of the First Wisconsin Trust Company of Milwaukee, as trustee (R. p. 92).

On said day Douglass Van Dyke delivered the 135,000 silver dollars received by him and by William D. Van Dyke, Jr., as trustees, to the First National Bank of Chicago, where an account was opened in their names as trustees. They substantially completed investment of the fund about the middle of April 1936, at which time they opened an account in the Marine National Exchange Bank, of Milwaukee, Wisconsin, to which account they transferred three or four thousand dollars (R. pp. 92-93).

Douglass Van Dyke and his cousin, William D. Van Dyke, Jr., are both residents of the City of Milwaukee, Wisconsin, and First Wisconsin Trust Company is a Wisconsin corporation located at Milwaukee, Wisconsin (R. p. 93).

The trustees of the trust here involved filed a donees' gift tax return with the proper taxing officers of the State

of Wisconsin, attaching a copy of the trust agreement, and protesting that the transfer was not subject to the Wisconsin gift tax (Exhibit 5b, R. p. 87; 119-120).

George D. Van Dyke, as donor, also filed a donors' gift tax return (R. p. 85).

The assessor of incomes notified the trustees that the gifts were subject to a tax under the laws of Wisconsin, and that taxes would be certified for collection unless within twenty days a written protest was filed in his office (Exhibit 6b, R. p. 87; 121). Protests were filed (R. p. 88). Proceedings were had before the County Board of Review in which the two matters were consolidated for hearing, and the Board sustained the tax assessments (R. pp. 79-80). Appeals were then taken to the Wisconsin Tax Commission, which entered an order confirming the assessments (R. pp. 71-77). Appeals were taken to the Circuit Court for Milwaukee County, Wisconsin, where judgments affirming the assessments were entered on December 15, 1939 (R. pp. 141-142). Appeals were taken to the Supreme Court of Wisconsin, which entered judgments on June 4, 1940, affirming the judgments of the Circuit Court for Milwaukee County, Wisconsin (R. p. 143).

Specification of Errors.

All of the assigned errors are intended to be urged in support of the contention that a substantial federal question is presented.

The errors assigned are:

1. In this suit there was drawn in question the validity of Section 4, Chapter 365, Wisconsin Session Laws of 1933, as amended by chapter 15, Wisconsin Session Laws of 1935, imposing an emergency gift tax, on the ground

that said statute was repugnant to section 1 of the XIV Amendment to the Constitution of the United States if construed and applied as imposing the tax on a gift of silver dollars made by delivery thereof in the State of Illinois, by a resident of the State of Wisconsin to residents of Wisconsin, in trust for residents of Wisconsin, because the State of Wisconsin lacked jurisdiction to tax such gift, and to do so would deprive appellants of property without due process of law, and the decision of the Supreme Court of the State of Wisconsin was in favor of the validity of said statute construed as imposing the tax on such gift, which decision is hereby assigned as error.

2. Said Court further erred in holding in its said decision that the silver dollars at the time of the gift had acquired a constructive taxable situs at the domicil of the donor.

3. Said Court further erred in holding in its said decision that the gift was in substance a transfer of intangibles having a constructive taxable situs at the domicil of the donor.

4. Said Court further erred in holding in its said decision that jurisdiction of Wisconsin to tax the actual transfer of the silver dollars in Illinois, could be predicated upon a constructive situs at domicil of donor of the property transferred, whether deemed tangible or intangible.

SUMMARY OF ARGUMENT.

The Wisconsin Emergency Gift Tax Act Construed as Imposing the Tax on a Gift of Silver Dollars Made by Delivery Thereof in Chicago, Illinois, is Repugnant to Sec. 1 of the XIV Amendment to the Constitution of the United States, Because the Tax so Imposed Would Deprive the Taxpayer of Property Without Due Process of Law by Reason of Wisconsin's Lack of Jurisdiction to Impose the Tax.

I — Nature of the Tax.

The tax is an excise on transfers *inter vivos* by gift, or by sale or exchange for an inadequate consideration.

II — Construction of the Statute.

The Supreme Court of Wisconsin construed the statute as authorizing the imposition of the tax on a gift of silver dollars made by delivery thereof in Chicago, Illinois.

III — Wisconsin Lacks Jurisdiction to Impose a Gift Tax on a Gift Completely Consummated in Another State.

A — Basis of jurisdiction to impose the tax.

Illinois, the state where the gift was made and completely consummated, had exclusive jurisdiction to impose a gift tax, because it regulated and protected the right to make the transfer, and the validity thereof was governed by its laws. Wisconsin contributed nothing. Domicil of the

parties, or the fiction of constructive situs of the property transferred, is immaterial.

B — Jurisdiction to impose other types of taxes distinguished.

To overturn the established basis of jurisdiction for imposition of a gift or sales tax, appellees refer to analogies in other fields of taxation where jurisdiction is predicated on fictions invoked for reasons not applicable to a gift or sales tax.

(1) Jurisdiction to impose an annual property tax is not analogous.

The annual personal property tax is not imposed in respect to a single event, as is the gift tax, but annually, by the state of domicil, for the protection ordinarily afforded by such state during the entire year. The property, though temporarily located elsewhere, is assumed to have a constructive taxable situs at domicil for the purpose of this tax.

Such constructive situs does not confer jurisdiction to impose an excise on an actual transfer of the property in another state.

Moreover, the tangible silver dollars here involved never acquired a constructive situs at domicil of donor.

(2) Jurisdiction to impose the income tax is not analogous.

The income tax is an annual tax which has been substituted for the annual personal property tax. It is imposed where the income is received. As income is payable at domicil, it is received at domicil in the exercise of a right protected by the state of domicil. A gift is not payable at domicil. The right to make or receive a gift is enjoyed where the gift is actually made.

(3) Jurisdiction to impose an estate or inheritance tax is not analogous.

(a) For the purpose of inheritance taxation, personal property, although temporarily located in another state, is assumed to have a constructive situs at domicil, because, by comity the succession to it is in accordance with the laws of the state of domicil.

Such constructive situs of property at death does not confer jurisdiction to impose an excise on an actual transfer of the property in another state.

Moreover, if donor had died before making the gift, the tangible silver dollars, stored in a vault in Illinois, would not have had a constructive situs at his domicil in Wisconsin.

(b) The state of domicil may impose reasonable conditions on the privilege or license of succeeding to the estate of decedent, including a condition that its estate tax be measured by property never belonging to decedent, or given away by him in contemplation of death.

Jurisdiction of the making of the gift is not essential. The question is whether it is reasonable for the state of domicil to include in the measure of its estate tax the value of the gift made in contemplation of death.

In the case of a gift tax on a gift *inter vivos* not made in contemplation of death, jurisdiction of the making of the gift is essential.

Pearson vs. McGraw, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211 is distinguishable on that ground.

C — Tax avoidance can not be made the basis of jurisdiction to impose the tax.

Pearson vs. McGraw, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211, does not overturn this established rule, because

in that case jurisdiction of the making of the gift was not involved. The question was the reasonableness of the condition, imposed by Oregon on the succession to the estate, that the value of the gift be included in the measure of the estate tax which it had jurisdiction to impose.

IV — A State Tax Imposed Without Jurisdiction Violates Section 1 of the XIV Amendment to the Constitution of the United States.

V — A Substantial Federal Question is Presented.

The important federal question presented is whether the State of Wisconsin may impose a tax on the exercise by one of its residents, in another state, of his natural right to make a transfer of his property by gift, even though made in another state for the express purpose of avoiding the Wisconsin gift tax.

ARGUMENT.

The Wisconsin Emergency Gift Tax Act Construed as Imposing the Tax on a Gift of Silver Dollars Made by Delivery Thereof in Chicago, Illinois, is Repugnant to Sec. 1 of the XIV Amendment to the Constitution of the United States, Because the Tax so Imposed Would Deprive the Taxpayer of Property Without Due Process of Law by Reason of Wisconsin's Lack of Jurisdiction to Impose the Tax.

I.

Nature of the Tax.

The tax is a temporary emergency excise tax imposed on transfers *inter vivos* by gift, or by sale or exchange for an inadequate consideration.

The tax is imposed by Section 4 of Chapter 363, Wisconsin Session Laws of 1933, pages 795-800 as amended to extend the time of the operation of the law to July 1, 1937, by Section 7, Chapter 15, Wisconsin Session Laws of 1935, page 30.

The pertinent provisions of the statute as amended are as follows (Italics ours):

> Section 4. *Emergency Gift Tax.* (1) An emergency tax is imposed upon transfers of property, real, personal or mixed, or any interests therein or income therefrom in trust or otherwise, to any person, association or corporation, which are made subsequent to the effective date of this act and prior to July 1, 1937, in the following cases, except as hereinafter provided:

(a) When the transfer is by gift from any person who at the date of such gift was a resident of the state.

(b) When the transfer is by gift of property within the state or within its jurisdiction and the donor was a non-resident of the state at the date of such gift.

(c) *No tax shall be imposed upon the transfer of any property which is taxable under the inheritance tax law of this state,* and any tax paid upon the transfer of any property under the provisions of this section may be applied as a credit upon any inheritance tax which may be imposed under the inheritance tax law upon the same transfer, and *no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily.*

(2) (a) If the transfer is made in property, the clear market value thereof at the date of the gift shall be considered the taxable value of the gift. Where property is *sold or exchanged for less than a fair consideration* in money or money's worth, then the amount by which the clear market value of the property exceeded the consideration received shall, for the purposes of the tax imposed by this chapter, be deemed a gift and shall be included in computing the amount of gifts made during the year.

It should be observed that the statute imposes the gift tax on two classes of gifts specifically mentioned: one from a non-resident when the property is within the state or within its jurisdiction, and the other "from a person who at the date of such gift, was a resident of the state," regardless of where the gift is made or of the nature or location of the property, but "no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily."

In the case at bar we are concerned only with the latter case; for the donor, a resident of Wisconsin, went outside the state to Chicago, Illinois, and there made and completed the gift of silver dollars then physically located in Illinois, by manual delivery thereof.

It should also be observed that the tax is an excise tax imposed not only on transfers by gift, but by sale or exchange for an inadequate consideration. It is analogous to a sales tax because the distinction between a gift and a sale is merely the adequacy of the consideration. Like a sales tax, it is imposed on an actual transfer of property by act of the parties in the exercise of their natural rights and may not be imposed on a transfer made without the state.

Though the gift tax act probably is supplemental to or in *pari materia* with the inheritance tax act, Wisconsin for that reason, cannot extend its jurisdiction so as to tax gifts consummated beyond its borders, because an individual cannot be stripped of his constitutional rights, even if this seems necessary in order to prevent avoidance of the Inheritance Tax Act.

Heiner vs. Donnan, 285 U. S. 312, at 328, 76 L. Ed. 772, 52 S. Ct. 358, at 362;

Hoeper vs. Tax Commission of Wisconsin, 284 U. S. 206, at 217, 76 L. Ed. 248, 52 S. Ct. 120, at 122;

Schlesinger vs. Wisconsin, 270 U. S. 230, at 240, 70 L. Ed. 557, 46 S. Ct. 260, at 261.

Federal gift and estate taxes do not involve questions of jurisdiction as between states.

II.

Construction of the Statute.

The language of the statute "and no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily" seems to be unambiguous.

The Supreme Court of the State of Wisconsin in its decision R. p. 145, notwithstanding that the word "located" had been given its ordinary meaning in *Bayfield County vs. Pishon,* 162 Wis. 466, construed such word as meaning constructive situs of the property transferred, at domicil of the donor. The court then argues that the silver dollars had a constructive situs at the domicil of the donor in Wisconsin, though they had never been within that state, and donor and donees at no time intended to take them there. The court then concludes that by reason of such constructive situs of the silver dollars at domicil of donor, Wisconsin had jurisdiction to impose the gift tax on the actual transfer of the silver dollars by manual delivery at Chicago, Illinois. Such construction of the statute renders it unconstitutional by reason of Wisconsin's lack of jurisdiction to impose the tax on the gift actually consummated in Chicago, Illinois. The judgment and decision of the Supreme Court of the State of Wisconsin sustaining the constitutionality of the statute as so construed, is assigned as error. This presents the important federal question hereinafter discussed.

III.

Wisconsin Lacks Jurisdiction to Impose a Gift Tax on a Gift Consummated in Another State.

A — Basis of jurisdiction to impose the tax.

The state where the gift is actually made has exclusive jurisdiction to impose the gift tax thereon, because such state regulates and protects the right of making the transfer, and the validity thereof is governed by its laws.

This proposition is well stated in *Great Atlantic & Pacific Tea Co. vs. Grosjean,* 301 U. S. 412, at 424, 81 L. Ed. 1193, 57 S. Ct. 772 at 776-777, as follows (Italics ours):

> "The state may not tax real property or tangible personal property lying outside her borders; *nor may she lay an excise or privilege-tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed.*"

Connecticut General Life Ins. Co. vs. Johnson, 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436;

Graniteville Mfg. Co. vs. Query, 283 U. S. 376, 75 L. Ed. 1126 L. Ed. 51 S. Ct. 515;

Hatch vs. Reardon, 204 U. S. 152, 51 L. Ed. 415, 27 S. Ct. 188;

Beale, Conflict of Laws (1935) Vol. 1, pg. 623, § 118 F. 2.

The actual transfer by manual delivery of the silver dollars in Chicago, Illinois, constitutes the exercise of rights regulated and protected by the laws of Illinois, and the validity of the transaction is governed by Illinois law.

This proposition is well stated in *United States vs. Guaranty Trust Co.,* 293 U. S. 340, at 345, 346, 79 L. Ed. 415, 55 S. Ct. 221, at 223, as follows (Italics ours):

"But under settled principles of conflict of laws, adopted by both federal and state courts, the validity of a transfer of a *chattel* brought into a country by the consent of the owner is governed by its law; *and that rule applies to negotiable instruments.*"

American Law Institute, Restatement Conflict of Laws, paragraphs 49, 52, 255-257;

Beale, Conflict of Laws (1935), Vol. II § 255.5 pg. 981, § 262.1 pg. 984, § 294.2 pg. 1018, § 294.3 pg. 1019;

Alcock vs. Smith (1892), 1 Chan. 238.

The above citations disclose that it is immaterial whether the silver dollars are deemed tangibles or intangibles like bearer negotiable instruments, because title to either passes on delivery in accordance with the law of the place where delivery is made.

Domicil of the parties is immaterial.

Hatch vs. Reardon, 204 U. S. 152, at 161, 51 L. Ed. 415, 27 S. Ct. 188, at 191.

Constructive situs of the property at domicil of the owner, under the fiction of *mobilia sequuntur personam,* is also immaterial when the property is actually transferred by delivery in another state.

Foppiano vs. Speed, 199 U. S. 501, at 520, 50 L. Ed. 288, 26 S. Ct. 138, at 141.

The basis of jurisdiction for the gift tax is the same as for sales taxes, stock transfer taxes, or other excise taxes, imposed upon the exercise of rights or privileges in a state selected by the parties.

The basis of jurisdiction to impose other types of taxes will now be examined in order to demonstrate that analogies can not be drawn therefrom.

B — Jurisdiction to impose other types of taxes distinguished.

The Wisconsin Tax Commission, Circuit Court for Milwaukee County, and Supreme Court of the State of Wisconsin have ignored the decisions of this court holding that a state lacks jurisdiction to impose an excise tax like the gift or sales tax on a transfer consummated in another state. In their eagerness to find some basis for jurisdiction, they seek to draw analogies from jurisdiction to impose entirely different types of taxes where the basis of jurisdiction is predicated on fictions invoked for reasons not applicable to taxation of gifts or sales.

It is universally recognized that fictions invented for a particular purpose can not logically be used by way of analogy to support some other proposition. If we start with a false premise we must necessarily reach a false conclusion. For example, the fiction that man and wife are one, though useful for some purposes, can not be made the basis of an argument that their separate incomes should be taxed together.

Hoeper vs. Tax Commission of Wisconsin, 284 U. S. 206, 76 L. Ed. 248, 52 S. Ct. 120.

(1) Jurisdiction to impose an annual property tax is not analogous.

The annual property tax is not imposed in respect to a single act or event, as is the gift tax.

It is imposed for the protection ordinarily afforded during the entire year by the state of domicil of the owner, and such state, rather than several states, in each of which the property might be temporarily located during the year, rightfully imposes the tax.

It would not constitute due process of law under the XIV Amendment to the Constitution of the United States, for each state in which property might come for a brief period, to impose thereon an annual tax for a year's protection.

See discussion of *Hays vs. Pacific Mail Steam-ship Company,* 17 Howard 596, by Professor Joseph H. Beale, in an article entitled "Social Justice and Business Costs" 49 *Harvard Law Review* 593, at 597, 598.

For imposition of the annual property tax, personal property temporarily without the state is said to have a constructive taxable situs at domicil. The maxim or fiction of *mobilia sequuntur personam* is sometimes invoked to support this desirable conclusion.

Beale, Conflict of Laws (1935), Vol. 1 § 118 F. 2, pg. 623.

The fiction does not apply to tangible personal property which is permanently without the state of domicil of the owner.

Wheeling Steel Corporation vs. Fox, 298 U. S. 193, 80 L. Ed. 1143, 56 S. Ct. 773.

The silver dollars were tangible personal property.

Blodgett vs. Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410.

Tangible personal property, as the derivation of the word "tangible" signifies, is personal property which can be handled or touched with the fingers.

Coins constituted one of the earliest forms of tangible personal property. They constituted the tangible wealth of the owner hidden in his cache or strong box, or displayed as personal ornaments.

Mr. Justice Story, in *United States vs. Moulton*, 5 Mason 537, assumes that coins are tangible, and then discusses whether bank notes by custom have become sufficiently like coins to be treated as tangible personal property, at least for some purposes.

The silver dollar, unlike a treasury note, contains no promise to pay. If lost, the owner has lost the thing itself and he is never reimbursed as sometimes is the case in respect to government bonds or paper money.

The silver dollars were never within Wisconsin, and there was no intention to bring them to Wisconsin, but to give them away in Chicago, Illinois.

As soon as the silver dollars came to rest in Illinois, being held there at the pleasure of the owner for disposal or use, they became a part of the general mass of property within the State of Illinois, and thus subject to its exclusive taxing jurisdiction.

State of Minnesota vs. Blasius, 290 U. S. 1, 78 L. Ed. 131, 54 S. Ct. 34;

Bacon vs. Illinois, 227 U. S. 504, 57 L. Ed. 615, 33 S. Ct. 299.

If donor had taken the silver dollars from Wisconsin to Chicago to be sold or given away, and never to be returned to Wisconsin, their situs in Wisconsin for property taxation would be lost as soon as they crossed the state line.

In the case of *Delaware, Lackawanna & Western R. R. Co. vs. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077, 25 S. Ct. 669, the question was presented of whether or not coal was permanently or only temporarily outside of the State of Pennsylvania. The coal had been transported beyond the state line to be sold in a foreign state and never to return in kind. This court states at 198 U. S. page 356:

"However temporary the stay of the coal might be in the particular foreign states where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania."

The Judge of the Circuit Court for Milwaukee County, Wisconsin, in his decision (R. pp. 124, 130), went so far as to invoke in substance the fiction of equitable conversion to convert the silver dollars into the intangibles, in which the silver dollars might subsequently be invested, so as to invoke the fiction of a constructive situs at domicil, as a basis for jurisdiction to impose a gift tax on the actual transfer of the silver dollars at Chicago, Illinois.

Pennsylvania, which is the only state that ever attempted to use the fiction of equitable conversion as a basis of jurisdiction, repudiated the theory in the case of *In re Paul's Estate,* 303 Pa. 330, 154 Atl. Rep. 503 at 504, where the New York and Massachusetts decisions to the contrary are cited and followed.

See also:

Connell vs. Crosby, 210 Ill. 380, 71 N. E. 350.

This effort to treat the silver dollars as intangibles is based upon the false analogy that a constructive situs of the intangibles at domicil for property taxation would confer jurisdiction on the state of domicil to impose a gift tax on the actual transfer thereof in another jurisdiction.

(2) Jurisdiction to impose the income tax is not analogous.

The income tax is an annual tax which has been substituted for the annual property tax on personal property.

It is imposed where the income is received, upon the year's net income treated as a unit. As income is usually payable at domicil it is not unreasonable to hold that it is received at domicil in the exercise of the right to receive protected by the state of domicil.

Lawrence vs. State Tax Commission of Mississippi, 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556;
People of the State of New York vs. Graves, 300 U. S. 308, 81 L. Ed. 666, 57 S. Ct. 466.

In *Guaranty Trust Company of New York vs. Commonwealth of Virginia*, 305 U. S. 19, this court states at 23, 83 L. Ed. 16, 59 S. Ct. 1, at 3:

> "Here, the thing taxed was receipt of income *within* Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done *within her borders.*" (Italics ours.)

A gift, however, is not payable at domicil of donee. It is not made in payment of an obligation which has a constructive situs at domicil of the donee. The right to make or receive a gift is exercised and enjoyed where the gift is actually made.

(3) Jurisdiction to impose an inheritance or estate tax is not analogous.

Two aspects of such jurisdictions must be considered: (a) the fiction that the personal estate of a decedent wherever physically located has a constructive situs in the state of his domicil; (b) the theory that succession is a mere license or privilege, the enjoyment of which may be conditioned even to the extent of requiring that the tax be measured by property which never belonged to decedent, or had been given away prior to his death.

(a) Constructive situs at domicil.

How, when and where title to personal property passes on death has given rise to conflicting theories.

Beale, Conflict of Laws (1935), § 300.1 pg. 1026, §303.2 pg. 1031.

Obviously, the place of death should be disregarded because it might occur in an enemy or uncivilized country. The domicil of decedent at the time of his death is the most appropriate place for the administration of his personal estate—tangible or intangible. Succession to the entire personal estate, tangible and intangible, wherever located, was therefore assumed by comity to take place by operation of law at the domicil of the decedent at the moment of death, and to be governed by the laws of such jurisdiction.

Blackstone vs. Miller, 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277.

To support such conclusion, the maxim or fiction of *mobilia sequuntur personam,* is sometimes invoked, which fiction assumes, contrary to the fact, that all of the personal estate—tangible or intangible—is located at domicil at the instant of death.

When inheritance and estate taxes were invented, the state of domicil was at first permitted to impose the tax in respect to all of the personal estate, tangible or intangible, because such property had a fictitious situs in the state of domicil, and descended in accordance with its laws.

States where tangible personal property was permanently located also asserted jurisdiction to impose inheritance taxes in respect thereto. The transfer at death being an assumed transfer taking place by operation of law, might be assumed to take place in two different places at

the same time. Solely to avoid double taxation, this court has held that when the tangible personal property is located in a state other than that of domicil, the fiction of *mobilia sequuntur personam* should not apply, unless the property was merely temporarily without the state of domicil.

Frick vs. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603.

If donor had died a resident of Wisconsin while still holding the silver dollars in Chicago, the silver dollars would not have had a constructive situs in Wisconsin for inheritance tax purposes.

Blodgett vs. Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410;

Frick vs. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603;

City Bank Farmers Trust Co. vs. Schnader, 293 U. S. 112, 79 L. Ed. 228, 55 S. Ct. 29.

The importance of the intent of the owner is disclosed in the latter case.

As the donor is not dead, and did not make the gift in contemplation of death, and may not die a resident of Wisconsin, the question of constructive situs of the silver dollars under inheritance or estate tax laws is academic, especially as such constructive situs would have no possible bearing on the question of jurisdiction of Wisconsin to impose a gift or sales tax on an actual transfer consummated in another state.

(b) Right to condition succession.

It was also recognized at an early date that inheritance is not a right, but a mere privilege or license to the grant-

ing of which a state might annex such conditions as it saw fit.

Mager vs. Grima, 8 Howard 490;
Magoun vs. Ill. Trust & Savings Bank, 170 U. S. 283, 42 L. Ed. 1037, 18 S. Ct. 594.

The State of domicil, by reason of its control of the estate of a decedent and its right to condition the succession thereto, may impose an inheritance or estate tax measured by property constructively within its jurisdiction or never owned by decedent, by property given away by him in contemplation of death, or located in another state.

Whitney vs. Tax Commission, 84 L. E. 584, 60 S. Ct. 635;
Pearson vs. McGraw, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211;
Maxwell vs. Bugbee, 250 U. S. 525, 63 L. Ed. 1124, 40 S. Ct. 2.

The basis of jurisdiction of a State to impose its estate tax in respect to a gift made in contemplation of death, or to take effect in possession or enjoyment at death, is not necessarily jurisdiction of the gift, but jurisdiction of the estate of the resident decedent, with the right to require payment of a tax measured by the gift as though the gift had never been made, provided, that to do so is deemed reasonable when viewed in the light of the effect of the gift and the circumstances surrounding the making thereof.

States have usually held, as has been held by Wisconsin, that the inheritance or estate tax as applied to gifts in contemplation of death, does not attach when the gift is made. It attaches only on the death of donor. The gifts, together with the amount of the estate left by donor at the time of his death, constitute his estate for inheri-

tance tax purposes, taxable at the values and rates as of the date of his death.

Will of Uihlein, 187 Wis. 101.

In determining whether it is reasonable to include the value of the gift in the estate, the effect of the gift is usually examined to ascertain whether it is in effect a testamentary disposition and by reason of the gift the state of domicil has been deprived of inheritance or estate taxes which it might otherwise have collected. If the gift was of real estate or tangible personal property permanently located in another state, the state of domicil would not be deprived of taxes by reason of the gift.

Keeney vs. New York, 222 U. S. 525, 56 L. Ed. 299, 32 S. Ct. 105.

In *Bullen vs. Wisconsin*, 240 U. S. 625, 60 L. Ed. 830, 36 S. Ct. 473, the transfer was actually made in Chicago, though a power to revoke the transfer was retained. The transfer was of intangibles which would have formed a part of the estate of decedent in Wisconsin if they had not been transferred. It was therefore deemed reasonable that the values of such intangibles should be included in the estate of the decedent, who was a resident of Wisconsin at the time of his death, even though Wisconsin may not have had jurisdiction of the making of the gift.

Respondents cite as decisive of the present case, *Pearson vs. McGraw*, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211. In that case a resident of Oregon, *in contemplation of death*, transferred by trust instrument executed in Oregon, a large portion of his estate, which then had a business situs in Chicago, and had been converted into Federal reserve notes, for the purpose of making the transfer.

On his death, Oregon acquired control of his estate and jurisdiction to impose its estate tax thereon, including the value of this gift made in contemplation of death, if to do so would not violate the due process clause of the XIV Amendment to the Constitution of the United States. This court held that the inclusion of the value of such gift in the estate would not violate the XIV Amendment.

If the Federal reserve notes should be deemed tangibles, permanently located in Chicago, the gift would not deprive Oregon of its estate taxes. This court looking through form to substance determined that the effect of the gift was to transfer in contemplation of death a large portion of decedent's intangible wealth.

It should be observed that a jurisdictional question was not involved. Obviously Oregon had jurisdiction of the estate, and the sole question was whether or not Oregon might use as a measure for the tax which it had jurisdiction to impose, the value of the gift made in Chicago in contemplation of death.

It is not believed that this court intended to hold that tax avoidance could be made a basis of jurisdiction, or that a state could tax ordinary gifts or sales made by one of its residents, not in contemplation of death, in another state.

From the foregoing discussion of the basis of jurisdiction to impose annual property taxes, annual income taxes, and estate and inheritance taxes, it is evident that these analogies cannot be used as analogies to destroy the simple proposition so well stated in *Great Atlantic & Pacific Tea Co. vs. Grosjean*, 301 U. S. 412, at 424, 81 L. Ed. 1193, 57 S. Ct. 772 at 776-777, that a state may not lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed.

The domicil of the parties, and the constructive or fictitious situs of the property transferred is immaterial.

If the State of Wisconsin desires to tax indirectly gifts or sales made in another state, it must do so by some such tax as was approved by this court in *Henneford vs. Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524.

C — Tax avoidance can not be made the basis of jurisdiction to impose the tax.

Respondents have cited *Pearson vs. McGraw*, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211, as though it held that in every case where there was an attempted tax avoidance this court would disregard actualities and base jurisdiction to impose the tax on what the court assumed to be the substance or intent of the transaction. We do not believe that the case goes to this extent.

So far as we have been able to ascertain, tax avoidance has never been made the basis of jurisdiction to impose the tax.

The performance of an act in another state for the express purpose of avoiding payment of an excise tax imposed by the state of domicil does not confer jurisdiction on the state of domicil to impose an excise on such act.

Persons frequently go to another state to avoid a sales tax imposed by the state of their domicil. The only way to discourage such practice seems to be a tax such as was approved by this court in *Henneford vs. Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524.

It has long been established that

> "Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose

that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."

Helvering vs. Gregory, 69 Fed. (2d) 809, affirmed 293 U. S. 465;

United States vs. Isham, 17 Wallace 496.

The numerous decisions dealing with the distinction between tax evasion and tax avoidance are collected and analyzed in "Tax Evasion and Tax Avoidance" 38 *Columbia Law Review* 80.

Tax avoidance has been criticised in some of the earlier cases, and courts of equity have refused to use their extraordinary powers to assist tax avoidance.

Mitchell vs. Commissioners, 91 U. S. 206, 23 L. Ed. 302.

We have found no case decided by this court which made the purpose to avoid a tax the basis of tax liability. See a similar statement by Mr. Justice Hand, in *Chisholm vs. Commissioner of Internal Revenue,* 79 Fed. (2d) 14, at 15.

Also see quotations from English cases in *Sawtell vs. Commissioner of Internal Revenue,* 82 Fed. (2d) 221, at 222.

When jurisdiction is not involved, courts may look through form to substance and examine the purpose of the transaction in order to determine whether or not the transaction falls within the intent of the statute in granting an exemption, or is of such a nature that the state of domicil having jurisdiction of the estate of a decedent, might reasonably condition the succession on payment of a tax measured by such transaction. Cases of this type are:

Gregory vs. Helvering, 293 U. S. 465, 79 L. Ed. 596, 55 S. Ct. 266;

Pearson vs. McGraw, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211.

In the case of *Gregory vs. Helvering, supra,* the exemption provided in corporate reorganizations was denied, be-

cause, though each step specified in the act was followed, no reorganization was in fact attempted.

The cases cited in *Pearson vs. McGraw, supra,* are of this nature, with the exception of *Shotwell vs. Moore,* 129 U. S. 590, 32 L. Ed. 827, 9 S. Ct. 362, which is sometimes cited as holding that a person may not escape taxation by temporarily changing his property into a different form for the express purpose of avoiding the tax. The point actually involved in that case was the validity of a statute which taxed a monthly *average* bank balance when the bank balance had been reinvested in tax exempt securities on the taxing date. The taxpayer avoided paying a tax on his non-existent bank balance on the given date and on the tax exempt securities into which it had been converted, but was caught in the meshes of the above statute, which was held to be valid.

The fact that in the present case one of the purposes of donor in going to Chicago to make the transfer, was to avoid the Wisconsin gift tax does not confer jurisdiction on Wisconsin to tax such transfer. The use of the silver dollars, instead of a depreciated currency, was an appropriate means of making the gift. It was certainly as appropriate as the use of numerous small checks to pay a single obligation as in *United States vs. Isham,* 17 Wallace 496 and more so than the use of wheat or cattle.

IV.

A Tax Imposed Without Jurisdiction Deprives the Taxpayer of Property Without Due Process of Law, as Forbidden by Section 1 of the XIV Amendment to the Constitution of the United States.

The proposition that taxation without jurisdiction violates the due process clause of the XIV Amendment to the

Constitution of the United States, has been established in *Frick vs. Pennsylvania,* 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, and *Wheeling Steel Corporation vs. Fox,* 298 U. S. 193, 80 L. Ed. 1143, 56 S. Ct. 773.

V.

A Substantial Federal Question Is Presented.

The important federal question presented is whether the State of Wisconsin may impose a tax on the exercise by one of its residents in another state, of his natural right to make a transfer of his property by gift, even though made in another state for the express purpose of avoiding the Wisconsin gift tax.

Conclusion.

It is respectfully submitted that substantial Federal questions are presented by this appeal, and that the motion to dismiss the appeal or affirm the judgment of the Supreme Court of the State of Wisconsin, should be denied.

Respectfully submitted,

DOUGLASS VAN DYKE,
Counsel for Appellants.

GEORGE D. VAN DYKE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 265

WILLIAM D. VAN DYKE, JR., AND DOUGLASS VAN DYKE, AS TRUSTEES UNDER TRUST AGREEMENT DATED DECEMBER 6, 1935,

Appellants,

vs.

WISCONSIN TAX COMMISSION, JOHN H. LEENHOUTS, ASSESSOR OF INCOMES OF MILWAUKEE COUNTY, WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN E. MARTIN,
Attorney General of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 265

WILLIAM D. VAN DYKE, JR., AND DOUGLASS VAN DYKE, AS TRUSTEES UNDER TRUST AGREEMENT DATED DECEMBER 6, 1925,

Appellants,

vs.

WISCONSIN TAX COMMISSION; JOHN H. LEENHOUTS, ASSESSOR OF INCOMES OF MILWAUKEE COUNTY; STATE OF WISCONSIN; WISCONSIN DEPARTMENT OF TAXATION; AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLEES' STATEMENT OPPOSING APPELLATE JURISDICTION.

Pursuant to paragraph 3 of Rule 12 of the Rules of the United States Supreme Court appellees file this statement opposing appellate jurisdiction.

Nature of the Case.

This appeal is from a judgment of the Supreme Court of the State of Wisconsin, affirming an assessment of gift

taxes, imposed by the statutes of Wisconsin, against the appellants. Said judgment was entered June 4, 1940, in proceedings in the courts of the State of Wisconsin to review an order and decision of the Wisconsin Tax Commission which affirmed said assessment. The taxes involved were assessed pursuant to the provisions of Section 4 of Chapter 363, Laws of Wisconsin 1933, as amended by Chapter 15 of the Laws of Wisconsin 1935, upon a gift in trust to the appellants on December 6, 1935. The controversy arises over the liability of the appellants to a tax on said gift under said tax law. Appellants claim that they are not liable for the tax because of their contention that the transfer by gift, upon which the assessment was made, was beyond the taxing jurisdiction of the State of Wisconsin. At the time the gift was made the donor, the donees and the trustees of the gift in trust were all residents of the State of Wisconsin.

Statutes Involved.

Article VIII, Section 1 of the Wisconsin Constitution so far as here material, provides:

> Section 1. "• • • Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The Wisconsin Emergency Gift Tax Law, under which the tax here involved was assessed, was enacted by Section 4 of Chapter 363, Laws of Wisconsin 1933, and amended by Chapter 15 of the Laws of Wisconsin 1935. The pertinent provisions of said law, as so amended, are as follows:

> "Section 4. Emergency Gift Tax. (1) An emergency tax is imposed upon transfers of property, real, personal or mixed, or any interests therein or income therefrom, in trust or otherwise, to any person, asso-

ciation or corporation, which are made subsequent to the effective date of this act and prior to July 1, 1937, in the following cases, except as hereinafter provided.

"(a) When the transfer is by gift from any person who at the date of such gift was a resident of the state.

"(b) When the transfer is by gift of property within the state or within its jurisdiction and the donor was a nonresident of the state at the date of such gift.

"(c) No tax shall be imposed upon the transfer of any property which is taxable under the inheritance tax law of this state, and any tax paid upon the transfer of any property under the provisions of this section may be applied as a credit upon any inheritance tax which may be imposed under the inheritance tax law upon the same transfer, and no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily.

"(2) (a) If the transfer is made in property, the clear market value thereof at the date of the gift shall be considered the taxable value of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the clear market value of the property exceeded the consideration received shall, for the purposes of the tax imposed by this chapter, be deemed a gift and shall be included in computing the amount of gifts made during the year.

"(b) All transfers to the same donee by the same donor within the same calendar year shall be added together and the aggregate of such transfers shall be considered as one transfer for the purposes of taxation under this chapter, and the rates of tax hereinafter prescribed shall be applied to the aggregate of such transfers made within the same calendar year.

"* * *"

The remaining provisions of said section, specifying the rates of tax, exemptions, and methods of assessment and collection, are not here material.

Statement of Facts.

George D. Van Dyke, at the time of the gift here involved, was an attorney at law of the age of 82, and was and had been all his lifetime a resident of the city of Milwaukee, State of Wisconsin. He owned $270,000 of First Liberty Loan Bonds, which were called for redemption as of June 15, 1935. In the Rules and Regulations promulgated by the Secretary of the Treasury for the redemption of these bonds (Department Circular No. 535, issued April 22, 1935) it was required that said bonds be presented and surrendered to any federal reserve bank or branch, or to the Treasury Department at Washington, D. C., and that incorporated banks and trust companies were not agents of the United States for the purposes of such redemption. The federal reserve bank nearest to Milwaukee, Wisconsin was the federal reserve bank at Chicago, Illinois. Having ascertained that said bonds would not be redeemed in gold but that he could collect the same in silver dollars, George D. Van Dyke went to Chicago on November 22, 1935, taking with him $270,000.00 par value of said bonds and appointed the First National Bank of Chicago, Illinois his agent to surrender said bonds to the Federal Reserve Bank at Chicago for payment in silver dollars. As the Federal Reserve Bank at Chicago, however, did not then have on hand sufficient silver dollars, he returned to Milwaukee, Wisconsin.

Upon being informed that the requisite number of silver dollars had been shipped from Washington, D. C. to and received by the Federal Reserve Bank at Chicago, George D. Van Dyke, accompanied by his son Douglass Van Dyke,

on December 6, 1935, went to Chicago and met George B. Luhman, President of the First Wisconsin Trust Company of Milwaukee, Wisconsin, at the offices of the First National Bank of Chicago. Previous thereto two written trust instruments had been prepared.

By one of said trust agreements said George D. Van Dyke transferred $135,000.00 in silver dollars of the United States to his sons Douglass Van Dyke and William D. Van Dyke, Jr., as a gift in trust for the benefit of Louise Lawrence Van Dyke of Milwaukee, Wisconsin, a granddaughter of said George D. Van Dyke and daughter of said Douglass Van Dyke. By the other trust agreement said George D. Van Dyke transferred $135,000.00 in silver dollars of the United States to the First Wisconsin Trust Company of Milwaukee, Wisconsin as a gift in trust for Louise Van Dyke Hauxhurst of Milwaukee, Wisconsin, a daughter of said George D. Van Dyke.

Both of said trust agreements were signed by the donor, George D. Van Dyke, at Chicago, Illinois on said December 6, 1935. The first mentioned trust agreement was likewise at the same time signed by Douglass Van Dyke, as one of the trustees, but it had been previously signed by his brother and co-trustee, William D. Van Dyke, Jr., at Milwaukee, Wisconsin. The second trust agreement was signed on behalf of the First Wisconsin Trust Company of Milwaukee, Wisconsin, as trustee, by George Luhman its president, at Chicago, at the same time as it was signed by George D. Van Dyke, the donor, on said December 6, 1935.

Then George D. Van Dyke, Douglass Van Dyke and George B. Luhman went to the Federal Reserve Bank of Chicago, where the silver dollars were in the private vaults of the First National Bank of Chicago in said Federal Reserve Bank. They were admitted to said vaults, accompanied by a representative of the First National Bank of Chicago and a representative of the Federal Reserve Bank

and the 270,000 silver dollars stored in bags in vaults sealed in the name of the First National Bank of Chicago were delivered to George D. Van Dyke and he receipted therefor. Thereupon he delivered 135,000 of said silver dollars to Douglass Van Dyke as trustee under the first trust agreement who thereupon gave him a receipt therefor by himself and his brother, William D. Van Dyke, Jr. as trustees under the first trust instrument, he having a power of attorney to act for his said brother. George D. Van Dyke at the same time also delivered the other 135,000 silver dollars to George B. Luhman, as President of the First Wisconsin Trust Company of Milwaukee, Wisconsin, who receipted for the same on behalf of said First Wisconsin Trust Company, Milwaukee, as trustee under the second trust instrument.

On the same day, December 6, 1935, that the 135,000 silver dollars were so received, Douglass Van Dyke delivered them to the First National Bank of Chicago, with the request that it open an account in the name of Douglass Van Dyke and William D. Van Dyke, Jr., trustees. That amount remained there untouched until about two days after Christmas, at which time they bought a $10,000 par United States Savings Bond for $7,500.00. They completed the investment of said funds about the middle of April, 1936, at which time they had used up the balance in the Chicago bank and opened an account in the Marine National Exchange Bank of Milwaukee, Wisconsin, by transferring three or four thousand dollars of the said amount thereto.

The First Wisconsin Trust Company, acting through George B. Luhman, its president, on the same day delivered the 135,000 silver dollars it so received to the First National Bank of Chicago, and the said amount, at its request, was immediately credited to the account of the First Wisconsin National Bank of Milwaukee, which bank thereupon credited the account of the First Wisconsin Trust Company.

George D. Van Dyke, the donor, Douglass Van Dyke and William D. Van Dyke, Jr., trustees under the first trust instrument, Louise Lawrence Van Dyke, the principal beneficiary under the first trust instrument, and Louise Van Dyke Hauxhurst, the principal beneficiary under the other trust instrument, are *all* residents of Milwaukee, Wisconsin, and the First Wisconsin Trust Company, trustee of the other trust, is a corporation organized under the laws of the State of Wisconsin and is located at Milwaukee, Wisconsin.

In collecting said bonds and silver dollars, George D. Van Dyke, the donor, never had any intention of bringing the silver dollars to Wisconsin, and said silver dollars, which weighed approximately 7½ tons, had never been in the State of Wisconsin. There was no attempt at secrecy or evasion in the transaction, and the trust instruments expressly provided that full disclosure should be made to the taxing authorities of the State of Wisconsin.

The trustees under each of said trust instruments made donees' returns to the proper taxing officers of Wisconsin, but claiming therein that said gifts were not subject to the Wisconsin gift tax. The assessor of incomes notified them, pursuant to provisions of the Wisconsin statutes, that such gifts in trust were subject to a tax under the gift tax law of Wisconsin, and that the taxes thereon would be certified for collection unless they protested the same in the manner provided by the applicable Wisconsin statutes. The trustees duly protested and as the same facts and identical questions of law were applicable to the taxes on both gifts, the matters were heard together by the Board of Review, at which hearing the testimony and evidence were introduced. The Board of Review affirmed the assessment of gift taxes upon both gifts, and upon appeals by the trustees, the matters were reviewed by the Wisconsin Tax Commission upon the record made before the Board of Review, and

on November 30, 1938, it entered orders affirming the assessment of gift taxes in each case. All of the foregoing procedure was in accordance with and pursuant to applicable provisions of the Wisconsin statutes.

From such orders of the Wisconsin Tax Commission the trustees of the respective trusts took separate appeals, pursuant to the Wisconsin statutes, to the Circuit Court of Milwaukee County, Wisconsin, which on December 15, 1939, entered a judgment in each case affirming and sustaining the order of the Wisconsin Tax Commission. Thereupon the trustees appealed separately to the Wisconsin Supreme Court, which, pursuant to stipulation of the parties and order of the court, heard the cases together and affirmed the judgments of the Circuit Court, but entered separate judgments to that effect in each appeal on June 4, 1940.

The instant appeal is from the said judgment of the Supreme Court of Wisconsin which sustained the tax on the gift in trust to Douglass Van Dyke and William D. Van Dyke, Jr., as trustees under the first mentioned trust agreement. A companion appeal has also been taken to this Court by the First Wisconsin Trust Company of Milwaukee from the judgment sustaining the tax on the other gift in trust. The same set of facts are involved and identical questions of law are raised and presented in both cases.

No Substantial Federal Question is Presented.

1. Sole Question Presented is One of State Jurisdiction to Tax.

The Supreme Court of Wisconsin in its decision rendered June 4, 1940 (not yet reported but which is contained in the record herein), construed the Emergency Gift Tax Law of Wisconsin as applicable to and imposing a tax upon the gift in trust here involved, and held that as so construed and applied such taxing act was valid and constitutional as

against the claim of appellants that the imposition of such tax violated the due process clause of the Fourteenth Amendment. The decision of the Supreme Court of Wisconsin so construing the statute is binding upon and must be accepted by the Supreme Court of the United States in testing the validity thereof under the Constitution of the United States.

Michigan v. *Michigan Trust Co.* (1932), 286 U. S. 334, 76 L. Ed. 1136, 52 Sup. Ct. 512;

Quong Ham Wah Co. v. *Ind. Accid. Com'n of Calif.* (1921) 255 U. S. 445, 65 L. Ed. 723, 41 Sup. Ct. 373;

Tampa Waterworks Co. v. *Tampa* (1905), 199 U. S. 241, 50 L. Ed. 170, 26 Sup. Ct. 23.

Thus, the only question of a Federal character that could be presented by this appeal is the constitutionality of the Emergency Gift Tax Law of Wisconsin in imposing a tax upon the gift here involved.

The appellants claim as a basis for appellate jurisdiction and assign as error that the decision of the Supreme Court of Wisconsin is erroneous in holding:

(1) That the gift in trust concluded by the delivery of the silver dollars in the State of Illinois, by a resident of the State of Wisconsin to trustees, residents of Wisconsin, in trust for residents of Wisconsin is taxable under the Wisconsin gift tax law, because the State of Wisconsin lacked jurisdiction to tax such gift and therefore the decision of the said court in favor of the validity of said statute, construed as imposing a tax on said gift, deprives appellants of property without due process of law in violation of Section 1 of the XIVth Amendment to the Constitution of the United States.

(2) That the silver dollars had acquired a constructive taxable situs at the domicile of the donor at the time of the delivery thereof.

(3) That the gift was in substance a transfer of intangibles having a constructive taxable situs at the domicile of the donor.

(4) That jurisdiction of Wisconsin to tax the actual transfer of silver dollars in Illinois, could be predicated upon a constructive situs at the domicile of the donor of the property transferred, whether deemed tangible or intangible.

Thus the sole question raised on this appeal is whether the gift in question is within the taxing jurisdiction of the State of Wisconsin.

It is appellees' contention that this presents no substantial Federal question because the decision of the Supreme Court of Wisconsin that said gift is within the jurisdiction of the State of Wisconsin to impose taxes is not contrary to any decision of the Supreme Court of the United States, but on the contrary is in accord therewith and is so clearly right as to not be a proper subject of review.

The Supreme Court of the United States will decline jurisdiction, although the constitutionality of a State law is drawn in question, where it appears that the constitutional question is not substantial in character.

Vilas v. *Iowa State Board of Assessment and Review* (1937), 302 U. S. 637, 82 L. Ed. 496, 58 Sup. Ct. 38;

Zucht v. *King* (1922), 260 U. S. 174, 176, 67 L. Ed. 194, 198, 43 Sup. Ct. 24.

2. The Decision Below is in Accord With Decisions of This Court and so Clearly Right as Not to be a Proper Subject of Review.

No substantial Federal question is presented by a contention that constitutional rights have been violated, where

the question has been settled by prior decisions of the Supreme Court of the United States.

Utley v. *St. Petersburg* (1933), 292 U. S. 106, 78 L. Ed. 1155, 54 Sup. Ct. 593;

Manhattan L. Ins. Co. v. *Cohen* (1913), 234 U. S. 123, 58 L. Ed. 1245, 34 Sup. Ct. 874.

The purpose of gift taxes is to prevent or compensate for avoidance of death taxes by taxing gifts *inter vivos* of property, which but for the gifts *inter vivos*, would be subject in its original or converted form to taxes upon transfers at death. Thus, the gift tax is supplemental to the estate or inheritance tax; the two are in *pari materia* and must be construed together.

Estate of Charles Henry Sanford v. *Commr.* (1939), 308 U. S. 39, 84 L. Ed. (Adv. Sh.) 53, 60 Sup. Ct. (Adv. Sh.) 51;

Untemeyer v. *Anderson* (1928), 276 U. S. 440, 72 L. Ed. 645, 48 Sup. Ct. 353.

Therefore, statutes taxing transfers by gifts *inter vivos* are considered and read in the light of decisions of this Court relating to transfers in contemplation of or to take effect at death, and so far as the constitutional power to tax is concerned, there is no intelligible distinction between a tax upon the exercise of the power to give property *inter vivos* and the disposition of it by legacy.

Estate of Charles Henry Sanford v. *Commr.* (1939), 308 U. S. 39, 84 L. Ed. (Adv. Sh.) 53, 60 Sup. Ct. (Adv. Sh.) 51;

Burnett v. *Guggenheim* (1933), 288 U. S. 280, 77 L. Ed. 748, 53 Sup. Ct. 369;

Bromley v. *McCaughn* (1929), 280 U. S. 124, 74 L. Ed. 226, 50 Sup. Ct. 46.

The State of the owner's domicile may constitutionally impose a tax upon the transfer at death of tangible or intangible personal property which has not acquired an actual situs elsewhere, although the tangible personal property or the physical evidences of the intangible personal property may be outside of the domiciliary State, because such personal property has, for purposes of all taxation, a situs in law at the domicile of the owner thereof.

Curry v. *McCanless* (1939), 307 U. S. 357, 83 L. Ed. 1339, 50 Sup. Ct. 900;

First National Bk. v. *Maine* (1932), 284 U. S. 312, 76 L. Ed. 315, 52 S. Ct. 174;

Blodgett v. *Silberman* (1926), 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410.

The State of the owner's domicile may constitutionally impose a tax upon the transfer in contemplation of death of tangible or intangible personal property, which has not acquired an actual situs elsewhere, irrespective of where the tangible personal property or evidences of the intangible personal property may be.

Pearson v. *McGraw* (1939), 308 U. S. 313, 84 L. Ed. (Adv. Sh.) 139, 60 Sup. Ct. (Adv. Sh.) 211;

Bullen v. *Wis.* (1915), 240 U. S. 625, 60 L. Ed. 830, 36 Sup. Ct. 473;

Keeney v. *N. Y.* (1912), 222 U. S. 525, 56 L. Ed. 299, 32 Sup. Ct. 105.

The recent case of *Pearson* v. *McGraw* (1939), 308 U. S. 313, 84 L. Ed. (Adv. Sh.) 139, 60 Sup. Ct. (Adv. Sh.) 211 was followed by the Supreme Court of Wisconsin in rendering its decision and conclusively establishes that the gift here involved is within the taxing jurisdiction of Wisconsin.

In that case a decedent domiciled in Oregon owned intangibles which for many years were in possession of an

Illinois agent, who, at the decedent's direction, converted $450,000.00 of said intangibles into Federal reserve notes. The decedent executed an irrevocable trust agreement in Oregon pursuant to which the Federal reserve notes in Illinois were transferred to the said agent in trust for the benefit of certain designated persons. Five days thereafter the trustee converted the money into securities. After construing the various steps in the series which resulted in the transfer in trust as constituting but one integrated and indivisible transaction—a transfer by decedent of intangibles in contemplation of death—the court sustained an inheritance tax imposed by Oregon upon the transfer of the property in trust as a gift in contemplation of death on the authority of *Curry* v. *McCanless* (1939), 307 U. S. 357, 82 L. Ed. 1339, 50 Sup. Ct. 900. The court held that

> "constitutionally the property was 'within the jurisdiction of the state' of Oregon, since that jurisdiction is dependent not on the physical location of the property in the state, but on control over the owner."

Any difference in facts between *Pearson* v. *McGraw* and the instant case is without significance and does not in any way affect the force of the decision therein as controlling in this case. If anything that case was a *weaker* case upon which to sustain jurisdiction to tax than the instant case. In that case the transfer by gift was of Federal reserve notes, the proceeds of property that had been in Illinois for many years in the hands of the trustee, to an Illinois trustee with the intention that the trust property remain and be administered there—and it did in fact so remain. Here the gift was by a Wisconsin donor of silver dollars, the proceeds of the redemption of Liberty Loan bonds previously held by the donor at his domicil in Wisconsin, to Wisconsin trustees for Wisconsin beneficiaries, and the trust was to be and was administered in Wisconsin and the property comprising the trust *res* in fact was brought back to Wisconsin shortly thereafter.

Jurisdiction to tax intangibles or tangibles, which have not acquired a situs different than the domicile of the owner thereof, whether it be on the ownership, use or enjoyment thereof, is predicated upon the control over the owner thereof.

Curry v. *McCanless* (1939), 307 U. S. 357, 83 L. Ed. 1339, 50 Sup. Ct. 900.

Personal property, not having an actual *situs* elsewhere, has a situs at the domicile of the owner for the purpose of all taxation, including a tax upon the exercise of a constituent right therein, including the right to transfer. There is no distinction between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements.

McGoldrick v. *Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 84 L. Ed. (Adv. Sh.) 343, 60 Sup. Ct. 388.

A transfer in contemplation of death like an ordinary gift *inter vivos* embodies a transaction begun and completed wholly by and between the living; the generating source of either type of gift is to be found in the facts of life and not in the circumstances of death. The only relationship that it has to death is that the value at death of the property is the measure of the tax imposed thereon, but this is a mere administrative device.

Helvering v. *Hallock* (1940), 309 U. S. 106, 84 L. Ed. (Adv. Sh.) 382, 60 Sup. Ct. (Adv. Sh.) 444;

Heiner v. *Donnan* (1932), 285 U. S. 312, 76 L. Ed. 772, 52 Sup. Ct. 358.

There is no tenable difference between the jurisdiction possessed by the states of the situs of property to tax transfers *inter vivos* and on the death of the owner.

Frick v. *Pa.*, (1924) 268 U. S. 473, 69 L. Ed. 1058, 45 Sup. Ct. 603.

Jurisdiction to tax and the assertion of taxing power are interfered with only when the challenged tax is in *plain violation* of the constitution and there has been such flagrant abuse as may be remedied by some *affirmative* principle of constitutional law.

Newark Fire Ins. Co. v. *State Board*, (1939) 307 U. S. 313, 83 L. Ed. 1312, 59 Sup. Ct. 918;

So. Pac. v. *Ky.*, (1911) 222 U. S. 63, 56 L. Ed. 110, 32 Sup. Ct. 27.

From the foregoing it appears that the decision of the Supreme Court of Wisconsin on the Federal question was so plainly right as not to require reargument, and therefore no substantial Federal question is presented.

Re Boardman, (1897) 169 U. S. 39, 42 L. Ed. 653, 18 Sup. Ct. 291;

Re Spies, (1887) 123 U. S. 131, 31 L. Ed. 80, 8 Sup. Ct. 22.

Respectfully submitted,

JOHN E. MARTIN,
Attorney General of the State of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of the State of Wisconsin,
Counsel for Appellees.

P. O. Address:
State Capitol,
Madison, Wisconsin.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 265

WILLIAM D. VAN DYKE, JR., AND DOUGLASS VAN DYKE, AS TRUSTEES, UNDER TRUST AGREEMENT DATED DECEMBER 6, 1935, *Appellants,*

VS.

WISCONSIN TAX COMMISSION; JOHN H. LEENHOUTS, ASSESSOR OF INCOMES OF MILWAUKEE COUNTY; STATE OF WISCONSIN; WISCONSIN DEPARTMENT OF TAXATION; AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION TO DISMISS APPEAL OR AFFIRM.

Comes now the Wisconsin Tax Commission; John H. Leenhouts, Assessor of Incomes of Milwaukee County; State of Wisconsin; Wisconsin Department of Taxation; and Elmer E. Barlow, as Commissioner of Taxation of the

> "As was said in Clark *v.* Keith, 106 U. S. 464 (Bk. 27, L. Ed. 302), 'That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be reexamined on a subsequent writ brought in the same suit. This rule was distinctly stated in Supervisors *v.* Kennicott, 94 U. S. 498 (Bk. 24, L. Ed. 260), where numerous authorities are cited, beginning as early as Himely *v.* Rose, 5 Cranch, 313' (9 U. S. bk. 3 L. Ed. 111)."

Upon the prior appeal, appellee stood on its demurrer, admitting the contract to be validly executed in Tennessee (*Osborn* v. *Ozlin*, — U. S. —, 84 L. Ed. 709), and into that Tennessee contract, sought to integrate Mississippi's Code Sections 2294 and 5131, which was permitted by Mississippi's Supreme Court but denied by this Court, and thereasto, we submit:

(1) *This Court on the prior appeal considered and adjudged naught but deprivation of due process under the Federal Constitution.*

In *Hanley* v. *Donohue*, 116 U. S. 7, 27 L. Ed. 536, Syllabus 3, it is held:

> "An allegation as to the legal effect of a judgment • • • is admitted by demurrer."

and pursuant to appellee's rights, as adjudged in Appendix "A", appellee stood squarely upon its two Mississippi statutes, which it asserted gave it a right to a judgment and when the cause was heard before, appellee urged naught else to affirm, and properly so, because on that appeal, this Court's jurisdiction was limited to the Federal questions raised.

As said by Mississippi's court, 195 So. 671:

> "It was held in the recent case of McGoldrick, Comptroller of the City of New York, *v.* Compagnie Gen-

erale Transatlantique, 60 S. Ct. 670, 672, 84 L. Ed. —, decided by the Supreme Court of the United States on March 25, 1940, that: 'It is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed in the courts below. Blair *v.* Oesterlein Co., 275 U. S. 220, 225, 48 S. Ct. 87, 88, 72 L. Ed. 249; Duignan *v.* United States, 274 U. S. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996.' And, in the course of its opinion, the Court further stated: 'In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented.' The question of whether or not the requirement of the bond in controversy was a condition precedent to liability, under the Tennessee decisions, not having been presented by the demurrer, or argued in the briefs on the former appeal, should not be deemed to have been decided by the state Court when it affirmed the judgment of the trial court in sustaining the demurrer; but rather that the Court merely assumed that the proposition was to be conceded in the absence of an argument by the appellee to the contrary—an argument which the appellee was not required to make until after the federal question presented by the demurrer should have been first disposed of adversely to its contention, since a favorable decision in all the courts sustaining the demurrer would have rendered immaterial the decisions of the Tennessee Court on the question of whether the provisions of the bond involved was a condition precedent under the laws of that state.''

(2) *No jurisdiction in this Court upon the prior appeal to consider non-Federal questions.*

Appellee, on the prior appeal, did not seek to advert to Tennessee law, and did not, under Mississippi practice, raise that question in any way (Appendix A), and the jurisdiction of this Court is limited to Federal questions properly presented. Following this Court, Mississippi's court said:

> "Moreover, the jurisdiction of that court was necessarily confined to the federal question presented by the appeal, that is to say, whether the Supreme Court of Mississippi had erred in holding that the Mississippi statutes referred to, instead of the laws of Tennessee, should govern this contract made in Tennessee. Judicial Code, Section 237, as amended, 28 U. S. C. A., Section 344, Simpkins' Federal Practice 3rd Ed., section 953, page 283, Brinkerhoff, etc., Co. *v.* Hill, 281 U. S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107, 1113. Most assuredly, the issue of whether a provision in a contract of indemnity requiring a claim of loss to be made within a specified time, was a condition precedent to liability could not be deemed a federal question."

(3) *The questions determined on this appeal by Mississippi's court as to what was decided on the prior appeal is conclusive here.*

Res adjudicata is not a Federal, but a local question, and on the prior appeal, appellee made no question as to the law of Tennessee, which was not (a) presented to, (b) argued before, or (c) considered by Mississippi's court, and under Mississippi's decisions, Appendix A, the law in Tennessee became applicable first in due course when this Fourth Replication was interposed, and as against this decision there could not be any such thing as "law of the case". *Middlesex Banking Co.* v. *Field,* 84 Miss. 666:

> "It will be observed that I have confined the opinion to a ground not touched in the former opinion of the Court. Field *v.* Banking Co., 77 Miss. 180."

Brewer v. *Browning*, 115 Miss. 358, 76 So. 519; *State* v. *L. & N. Railroad*, 97 Miss. 35, 51 So. 918, 104 Miss. 413, 61 So. 425, 107 Miss. 507, 65 So. 881.

In *Sperry's Estate* v. *Sperry*, 196 So. (Miss.) 653, the rule is stated in Syllabus 2:

> "Where a case is reversed and remanded generally by the Supreme Court, it is tried de novo in the lower court, and additional pleadings may be interposed and additional evidence may be offered on the pleadings."

At page 656:

> "Where a case is reversed and remanded generally by this Court, it is in the lower court tried de novo. Additional pleadings may be interposed and additional evidence on the pleadings" (citing cases).

(4) *What the law of Tennessee was as a fact was not in issue until the present appeal.*

The decision on demurrer was not in any way controlling. *Central Trust Co.* v. *Meridian Light & Railway Co.*, 64 So. 216, 46 So. 415.

(5) *When, pursuant to remand, the State court accepts as binding that precedently determined in this Court, the construction thereafter of the local law—without challenge as to its validity, is not a Federal question.*

Pennsylvania Fire Ins. Co. v. *Gold Issue Mining, etc., Co.*, 243 U. S. 95, 61 L. Ed. 616.

In note, 74 A. L. R. 716, the rule is thus stated:

> "It is quite generally accepted that where the statute of the situs is merely construed in the court of the forum, without a denial of its validity, though it be construed erroneously, particularly in the absence of a construction of the statute by the courts of the situs, such a construction does not deny to the statute the full faith and credit required by the Constitution, and hence a litigant cannot complain that his rights acquired

> under the laws of another state were not recognized or enforced by the courts of the forum" (citing cases).

Furthermore, as at the date of the prior appeal, *Swift* v. *Tyson,* 16 Pet. 1, 10 L. Ed. 865, was operative here, and thereunder, as to this principle of general commercial law, this Court would have applied its independent judgment, but presently must apply the Tennessee decisions under *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78, 82 L. Ed. 1188, 1194, where it is said:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

So that the rule of law applicable here has thus been fundamentally changed and, therefore, when Mississippi's court recognized the mandate of this Court, to consider naught but Tennessee law, it did its full duty, and having so done, under the authorities, no Federal question presently exists.

b. In re: Blake, 175 U. S. 114, 44 L. Ed. 94:

This case is next cited by appellant, but it merely held that mandamus would not lie to compel the Supreme Court of Tennessee to conform to what the petitioner there believed to have been established by this Court.

Here, no statute of Mississippi is involved as on the former appeal. Mississippi's court has given full effect to delete Mississippi Code Sections 2294 and 5131, and having so done, considered this contract solely under Tennessee's laws. This Court by its mandate on the prior appeal merely enjoined upon Mississippi's court, if the contract sued on were a Tennessee contract under the facts validly effected, *Osborn* v. *Ozlin,* — U. S. —, 84 L. Ed. 709, to apply the Ten-

nessee law. This Court was not requested to construe the Tennessee law, nor to apply the Tennessee law, nor adjudicate the rights of the parties thereunder further than it was requested to remove from consideration Mississippi's statutes, which were without effect thereasto. On the second appeal to Mississippi's court, the Tennessee law alone was looked to and construed, it being admitted that such law was, under the Fourth Replication, that solely applicable, and therefor this then became a question of construction, naught else.

In *Allen* v. *Alleghany Co.*, 196 U. S. 458, 49 L. Ed. 551, there was a motion to dismiss and plaintiffs in error pleaded that the note upon which suit was brought was executed in New York and that under the laws of that State, no foreign corporation could do business without a certificate of the Secretary of State that it had complied with all of the requirements of the law and that no such corporation could sustain any action in the State without complying with conditions. The Supreme Court of New Jersey held that though not enforceable in the courts of New York and Pennsylvania, it might be enforced in New Jersey and plaintiff in error insisted that under the full faith and credit clause, there was a denial as to the statutes of New York in contravention of the constitution. This Court said:

> "In several cases we have held that the construction of a statute of another state, and its operation elsewhere, did not necessarily involve a Federal question. The case is practically governed by that of Chicago & A. R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519, 7 Sup. Ct. Rep. 398."
>
> * * * * * * *
>
> "Since the above case we have repeatedly held that the mere construction by a state court of a statute of another state, without questioning its validity, does not, with possibly some exceptions, deny to it the full

faith and credit demanded by the statute in order to give this court jurisdiction" (citing cases).

In *Smithsonian Institution* v. *St. John*, 214 U. S. 19, 53 L. Ed. 892, this Court said:

> "On the other hand, it is settled that the mere construction by a state court of the statute of another state, without questioning its validity, does not deny to it the full faith and credit demanded by the constitutional provision (citing cases)."

In *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 47 L. Ed. 273, Mr. Justice Brown said:

> "Whether the supreme court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was immaterial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of Banholzer *v.* New York L. Ins. Co., 178 U. S. 402, 44 L. Ed. 1124, 20 Sup. Ct. Rep. 972, and in principle by Glenn *v.* Garth, 147 U. S. 360, 37 L. Ed. 203, 13 Sup. Ct. Rep. 350; Lloyd *v.* Matthews, 155 U. S. 222, 39 L. Ed. 128, 15 Sup. Ct. Rep. 70. To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment.
>
> "The validity of the New York statute was not called in question. The case turned upon its construction. This was not a Federal question. Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169; Baltimore & P. R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908, 9 Sup. Ct. Rep. 503.
>
> "The writ of error is dismissed."

The *Blake* case is likewise distinguishable upon the grounds urged, *supra*, as to the *Chaffin* v. *Taylor* case (116 U. S. 567, 29 L. Ed. 727).

c. Appellant next relies upon *Georgia Ry. etc. Co.* v. *City of Decatur,* 297 U. S. 620, 80 L. Ed. 926. With deference, this case directly supports appellee's contention. Said this Court:

> "After notice to the parties, the Supreme Court, with felicitous recognition of obligation to do nothing in conflict with the ruling here, again considered the original record. September 30, 1935, after disclaiming any purpose theretofore to construe the pertinent State statutes as unhappily chosen words had led us to conclude, it announced their meaning and once more affirmed the decree of the trial court. 181 Ga. 187, 182 S. E. 32. A second appeal gives us jurisdiction.
>
> "Appellants insist, first, that the decree presently challenged is not consistent with our opinion and mandate; and, second, that, if the Georgia statutes be construed and applied as finally ruled by her Supreme Court, they will be deprived of equal protection and due process of law, contrary to the Fourteenth Amendment.
>
> "As appears from our opinion of April 29, 1935, following long established doctrine, we accepted the construction of the statutes placed upon them by the Supreme Court and decreed accordingly. Elmendorf *v.* Taylor, 10 Wheat. 152, 159, 6 L. Ed. 289, 292; Chicago, M. St. P. & P. R. Co. *v.* Risty 276 U. S. 567, 570, 72 L. Ed. 703, 706, 48 S. Ct. 396. So regarded, they empowered the municipality to assess paving costs against the utility only upon the basis of benefits received. And, as appellants had been deprived of opportunity to show the absence of advantage, we held due process of law had been denied.
>
> "After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court and held that so to apply them would deprive appellants

of a federal right. We suggested no interpretation of our own, and did not affimatively indicate the further action to be taken. Schneider Granite Co. *v.* Gast, 245 U. S. 288, 291, 62 L. Ed. 292, 295, 38 S. Ct. 125. The decree now under consideration is not in conflict with anything said or done by us. Appellants' claim to the contrary is not well founded. Without exceeding the limitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon the statutes, and adjudged accordingly."

Mississippi's Court, pursuant to the mandate of this Court, deleted Mississippi's statute and construed Tennessee's laws, assuming them to be valid, and this contract to be governed thereby.

This Court is jealous of its jurisdiction, saying in *Southwestern Bell Tel. Co.* v. *Oklahoma,* 303 U. S. 212, 82 L. Ed. 755:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it (Citing cases)."

Further, in *Glenn* v. *Garth,* 147 U. S. 360, 37 L. Ed. 203, at pages 368—206, the Chief Justice said:

> "If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction

would be enlarged in a manner never heretofore believed to have been contemplated.

"The distinction between the construction of a statute and the validity of a statute has frequently been adverted to by this court. Baltimore & P. R. Co. *v.* Hopkins, 130 U. S. 210 (32:908) and cases cited. In Grand Gulf R. & Bkg. Co. *v.* Marshall, 53 U. S. 12 How. 165 (13:938) the case was brought up from the supreme court of Louisiana, and involved an assignment by a corporation of Mississippi under the laws of that state. Mr. Chief Justice Taney, delivering the opinion of the court, after stating that, 'in order to give this court jurisdiction the record must show that the point was brought to the attention of the state court and decided by it,' for the obvious reason that 'the party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled under the Constitution or laws of the United States; but if he omits to claim it in the state court there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for anything that appears in the record the judgment of the state court might have been in his favor if its attention had been drawn to the question,' goes on to say that 'it appears that the decision turned upon the construction (not the validity) of the act of Mississippi of 1840; and upon a question of merely local law, concerning the right by prescription claimed by the trustees. Nothing is said in relation to the constitutionality or validity of this act of Mississippi, and the opinion of the court clearly shows that no such question was raised or decided.' The writ of error was therefore dismissed for want of jurisdiction. It does not seem to have occurred to the Chief Justice that the writ could be maintained upon the ground of a denial of full faith and credit to the Mississippi statute by the construction given by the Louisiana court."

Appellant did not demur to the Fourth Replication as it did to the precedent three replications, but voluntarily took in the lower court precisely the same view thereof as was

taken by Mississippi's Supreme Court, conceding that if under the proper construction of Tennessee's decisions there was liability, then thereunder appellant was liable, and the Mississippi Court, construing said Tennessee law (admitting its applicability and validity), as directed, did not in so construing, determine any Federal question, but conformed strictly to the mandate given, frankly, going further than Mississippi's court was required to go, this Court having said of this decision in *Osborn* v. *Ozlin*, — U. S. —, 84 L. Ed. 709:

> "(This contract) *validly made* in Tennessee, could not be subsequently enlarged by Mississippi to do as to a condition of 'substantial importance' when suit was later brought on the policy in Mississippi, simply because 'the interest insured was in Mississippi when the obligation to indemnify * * * matured, and it was * * * (the company's) duty to make payment there.' 292 U. S. at 149, 78 L. Ed. 1181, 54 S. Ct. 634, 92 A. L. R. 931. At the time the contract was entered into Mississippi had no interest in the risk covered. The court felt that, even at the time of suit, 'performance at most involved only the casual payment of money in Mississippi,' *Id.* 292 U. S. at 150, 78 L. Ed. 1182, 54 S. Ct. 634, 92 A. L. R. 931, and that was an interest so subordinate to that of Tennessee that the latter was entitled to have the right of way. No question was thus involved touching the right of a state to regulate companies doing business within its borders as to contracts of insurance covering local risks."

When appellee took issue thereon, it developed that appellee had never qualified to do business in Tennessee and under Tennessee's decisions could not appear therein as a corporate entity. *Campbell-Moss-Johnson* v. *Lupton*, — Tenn. —, 290 S. W. 992, 51 A. L. R. 374, note 384, 390. And thereby it may well have been presumed, appellee being without corporate power, that the parties intended to make

the contract lawful by *situsing* it in Mississippi. *Pritchard* v. *Norton*, 106 U. S. 124, 136, 27 L. Ed. 104, 108; 11 *Am. Juris.*, 405; 2 *Beale, Conflict of Laws*, 1165, Sec. 332.49. But Mississippi's court, under appellant's admission, assumed Tennessee's laws to be solely applicable, and so assuming, in good faith, construed them properly, and thereby no Federal question arose.

Point II.

Appellant's Second Assignment is: "The Supreme Court of Mississippi was in error in holding that under the Tennessee decisions the provision of the bond that any claim thereunder must be made upon the surety within fifteen months after termination of its suretyship for the defaulting employee, was not a condition precedent, compliance with which was essential to a recovery upon the bond."

But thereof,

(a) No point is made under the statement as to jurisdiction;

(b) Where there is mere construction without a challenge of validity, no Federal question arises. *Smithsonian Institute* v. *St. John*, 214 U. S. 19, 35 L. Ed. 872; *Finney* v. *Guy*, 189 U. S. 35, 47 L. Ed. 839; *Glenn* v. *Garth*, 147 U. S. 360, 368, 37 L. Ed. 203, 206.

This precise point was decided adversely to us by this Court in *Canal Commercial Tr. & Sv. Bank* v. *Brewer*, 273 U. S. 638, 71 L. Ed. 816, where Mississippi's court merely construed but did not question a Louisiana statute.

(c) This Court had no jurisdiction under Section 237, Judicial Code, as amended, 28 U. S. C. A., Section 344.

This Section grants jurisdiction—

(a) Where there is "drawn in question the validity of a treaty or statute of the United States • • • the validity

of a statute of any state," when review may be had by appeal;

(b) By Certiorari when there is "drawn in question the validity of a treaty or statute of the United States * * * the validity of a statute of any state * * * or where any title, right, privilege or immunity is specially set up or claimed, by either party under the Constitution, or any treaty or statute of * * * the United States."

On this appeal there is no statute whatsoever in Tennessee, no statute in Mississippi, but only a determination by Mississippi's court as to what the Tennessee decision holds to be the law in Tennessee as to a matter of private contract under an insurance policy. Mississippi's analysis, with deference, of Tennessee's decisions is perfectly correct, but under the decisions of this Court, quoted *supra*, even if it were not, this Court would have no jurisdiction.

WHEREFORE, Mississippi's court having recognized the mandate and deleted from consideration the sections condemned, namely, 2294 and 5131, this Court is without jurisdiction of this appeal, but if therein we err the judgment should be affirmed forthwith because no substantial Federal question not previously fully adjudicated is herein presented.

Respectfully,

MARCELLUS GREEN,
Jackson, Mississippi;
WALTER SILLERS,
Rosedale, Mississippi;
W. C. ROBERTS,
Rosedale, Mississippi;
OSCAR JOHNSTON,
Scott, Mississippi;
GARNER W. GREEN,
Jackson, Mississippi;
Attorneys for Appellee.

APPENDIX "A".

SUPREME COURT OF MISSISSIPPI.

No. 33674.

HARTFORD ACCIDENT & INDEM. CO. *v.* DELTA & PINE LAND CO., 195 So. 667.

April 29, 1940.

1. *Courts* Key 97(6).

Where in action on fidelity bond, demurrer was sustained to plea relying on policy requirement that claim be made within five months after termination of the suretyship, on ground that such requirement was invalid under Mississippi statutes, but such determination was reversed by United States Supreme Court on ground that Tennessee rather than Mississippi law was applicable, because the contract was made in Tennessee though defalcations occurred in Mississippi, a federal question only was involved, and such decision was not 'law of the case' so as to require determination, under replications to the plea, that such requirement was valid under Tennessee law, notwithstanding that courts had assumed that Tennessee law was favorable to insurer. Code 1930, Sections 2292, 2294, 5131; U. S. C. A. Const. art. 1, Section 10; art. 4, Section 1; Amend. 14, Section 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case."

2. *Courts* Key 97(6).

On appeal from decision of Mississippi Supreme Court affirming judgment sustaining demurrer to plea relying on policy provision that was invalid under Mississippi statutes, jurisdiction of United States Supreme Court was necessarily confined to the federal question presented, of whether state Supreme Court had erred in holding that Mississippi statutes rather than Tennessee law should govern contract made in Tennessee, and determination of whether provision requiring claim of loss to be made within a specified time was a condition precedent to liability could not be deemed

a "federal question". Jud. Code Section 237, as amended, 28 U. S. C. A. Section 344.

See Words and Phrases, Permanent Edition, for all other definitions of "Federal Question."

3. *Insurance* Key 539(5).

Where fidelity bond made the sustaining of loss, filing of claim, and proof of loss with home office, and filing of suit within 12 months after making of claim, the only conditions precedent to liability, failure to comply with condition requiring the claim to be made within 15 months after loss merely postponed the time for bringing suit, under Tennessee law, and did not forfeit the right to recover.

4. *Insurance* Key 146(3).

Under Tennessee and Mississippi law, provision making a policy requirement a condition precedent to liability by authorizing forfeiture for failure to comply with such requirement must be either expressed or clearly implied from the terms employed.

ETHRIDGE, *J.*, dissenting.

In Banc.

Appeal from Circuit Court, Bolivar County; Wm. A. Alcorn, Jr., Judge.

Action by the Delta & Pine Land Company against the Hartford Accident & Indemnity Company, to recover on fidelity bond. From a judgment for plaintiff, defendant appeals.

Affirmed.

Shands, Elmore, Hallam & Causey, of Cleveland, and Wm. M. & Wm. G. Hall, of Memphis, Tenn., for appellant.

Sillers & Roberts, of Rosedale, and Green, Green & Jackson, of Jackson, for appellee.

McGEHEE, Justice.

This case was first argued orally before, and submitted to, Division B of the Court for decision, and the judgment of

the court below in favor of the appellee was reversed and the cause dismissed. On suggestion of error, a request was made of counsel to file additional briefs on the question of whether or not a clause contained in the fidelity bond sued on, requiring any claim thereunder to be made within fifteen (15) months after the termination of the suretyship for the defaulting employe, was a condition precedent to liability. This point had been raised in the *fourth* replication filed in the trial court, by the appellee to the plea of the appellant, and that court had held that the right of action could not be defeated, "unless there is some forfeiture in the bond, or there is some stipulation that there will be no liability." In the opinion rendered by Division B as aforesaid, as reported in 188 So. 539, it was said that *three* replications to the appellant's plea had been filed in the trial court. The substance of the first three replications was then set forth in the opinion, and it was held that the demurrers thereto should have been sustained. These three replications merely set forth anew, and also urged additional grounds for, the contention theretofore made by the appellee on a former appeal of the case to this Court, as reported in 169 Miss. 196, 150 So. 205; and to the Supreme Court of the United States, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, to the effect that the rights of the parties under the fidelity bond sued on were governed by sections 2294 and 5131 of the Mississippi Code of 1930 and the decisions of our Court, instead of the laws of the State of Tennessee, whereas, the fourth replication raised for the first time the specific issue of whether or not, even under the Tennessee decisions, a compliance with the clause of the fidelity bond, relied on in appellant's plea as a bar to recovery, was made a condition precedent to liability, as will be hereafter shown. In the opinion rendered by Division B on the present appeal, 188 So. 539, supra, no reference was made to this fourth replication, nor was the point involved therein specifically discussed or decided, on account of the fact that the briefs of counsel were largely devoted to reargument of the questions again raised by the first three replications, which had been settled adversely to the appellee's contention by the decision of the United States Su-

preme Court, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, supra, reversing the decision of this Court on the former appeal, as rendered in 169 Miss. 196, 150 So. 205, supra. Upon consideration of the suggestion of error and briefs thereon, the opinion rendered by Division B, as aforesaid, was withdrawn, the judgment of reversal set aside, the cause remanded to the docket for argument before Division A, and thereafter submitted for decision by the Court in banc.

The appellant Indemnity Company contends that the appellee was precluded by the law of the case from raising the issue presented by its fourth replication to the appellant's plea, after the remand of the case to the Circuit Court of Bolivar County for further proceedings not inconsistent with the opinion rendered by the Supreme Court of the United States aforesaid; also, that under the laws of Tennessee its plea is good, and was sustained by the proof. To determine these two questions it is necessary to first state the issue involved on the former appeal here, and the federal question presented to the Supreme Court of the United States when it reversed the former decision of this Court; and second, to review the decisions of the Tennessee Court and the law as stated by the text writers on the question of whether or not a non-compliance with the provision of the fidelity bond relied on as a defense to the suit is a condition precedent to liability, or whether a failure to comply therewith merely serves to postpone the right to sue.

On the former appeal the appellee had recovered a judgment against the appellant Indemnity Company for the sum of $2,703.79 because of the alleged default of H. H. Harris, who was listed in a fidelity bond as the treasurer of the appellee, employed in its office at Memphis, Tennessee, and whose honesty and fidelity, was insured to the extent of any defalcations, committed in any position, anywhere, not exceeding the sum of $25,000, and which bond was entered into and consummated in the state of Tennessee, where the appellee then had its principal office, and where the appellant Indemnity Company maintained a local office.

The declaration alleged that subsequent to the execution and delivery of the contract of indemnity at Memphis, the

appellee moved its office to Scott, Mississippi, where the defalcations of Harris occurred on various dates between May 9, 1929, and September 20, 1929, all in Bolivar County, Mississippi, where the appellee was then engaged in conducting a large planting operation as its principal business. That these defalcations were not discovered in the exercise of due diligence until May 24, 1931, when notice was given immediately to the appellant. That within three months thereafter affirmative proof of the loss was filed with the appellant at its home office at Hartford, Connecticut; and the suit was filed within twelve (12) months of the filing of the proof of loss, as required by the policy.

The contract of indemnity was terminated on December 31, 1929, and the appellee had not made its claim until June 22, 1931, which was more than fifteen months after the termination of the contract of suretyship, but within thirty (30) days of the discovery of the shortage, according to the allegations of the declaration.

The appellant filed a plea to the declaration, to the effect that the cause of action could not be maintained for the reason that the contract contained the additional clause which provides that, "Any claim must be duly made upon the surety within fifteen (15) months after the termination of the contract of suretyship for the defaulting employee, • • •." And the plea averred that plaintiff did not make claim for its loss within the time above required. That, wherefore, the plaintiff should not have its action against the defendant for the reason that the fidelity bond sued on is a Tennessee contract, and is governed by the laws of that state. That, therefore, full faith and credit must be given thereto in the courts of Mississippi under the requirements of article 4, section 1, article 1, section 10, and section 1 of the Fourteenth Amendment to the Constitution of the United States, since there is no statute in Tennessee which prohibits the limitation aforesaid in such contracts of insurance or indemnity, and averred that the highest court of Tennessee, in the cases of Guthrie *v.* Indemnity Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Co. *v.* Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128; City of Bristol *v.* Bostwick, 146 Tenn. 205, 240 S. W. 774, and other deci-

sions of that court not cited in the plea, had held that such a limitation was valid and binding.

Instead of replying to this plea by saying that while it is true that the provision in the bond, non-compliance with which the defendant had set up therein as a defense, is valid and binding under the decisions of the Tennessee court, and not prohibited in such contracts by any statute of that state, it did not constitute a condition precedent to liability, since the contract did not so provide, nor provide for a forfeiture in the event of a failure to comply therewith—the plaintiff saw fit not to then file a replication to the legal conclusion contained in the defendant's plea of the effect of the Tennessee decisions, or to plead the fact, to be disclosed by the evidence, that the contract contained no clause providing for a forfeiture for failure to make claim for the loss within fifteen (15) months after the termination of the contract of suretyship, or clause making the filing of the claim within that time a condition precedent to liability, but demurred to the plea and assigned the following grounds:

"1. The construction and validity of the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15) months after the termination of the suretyship for the defaulting employee is not determined by the laws of the state of Tennessee but is determined by the laws of the state of Mississippi.

"2. The statutes of limitations of the state where the suit is brought is the statute of limitations which governs the time within which actions may be brought, and the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee is in violation of section 2294 of the Mississippi Code of 1930 (section 2491 of Hemingway's 1917 Code of Mississippi), and in violation of the public policy of the state of Mississippi, and the courts of this state are not required to give full faith and credit to said provision under and in accordance with the requirements of article 4, section 1; article 1, section 10

and section 1 of the Fourteenth Amendment of the Constitution of the United States as contended in defendant's said plea."

The Circuit Court of Bolivar County having sustained this demurrer, the defendant Indemnity Company declined to plead further, and the judgment was thereupon rendered against it for the alleged defalcations of the plaintiff's employee, Harris, in the sum hereinbefore mentioned. On the appeal here, as reported in 169 Miss. 196, 150 So. 205, supra, the Court affirmed the judgment of the Circuit Court, on the ground that section 5131 of the Mississippi Code of 1930, defining insurance, rendered the fidelity bond sued on a contract of insurance, and solvable under the laws of this state, though made in Tennessee, since the statute provides that, "All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein;" and, further, that in view of the fact that section 2292 of said Code provides that, "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after," and section 2294 thereof renders null and void any change in this limitation by contract between the parties, the plea constituted no defense to the suit. In so holding that these statutes rendered the contract solvable under the laws of Mississippi instead of Tennessee, our Court was adhering to its former decisions in that regard, whereby the Court, as observed in the opinion referred to, had committed itself to the proposition that a contract of insurance on an interest in this state, although the contract be made in another state, was to be determined by the laws of our own state; and cited in support thereof the cases of Fidelity Mutual Ins. Co. *v.* Miazza, 93 Miss. 18, 46 So. 817, 136 Am. St. Rep. 534; Stuyvesant Ins. Co. *v.* Smith Motor Sales Co., 135 Miss. 585, 99 So. 575, which so held. Hence, the appellee was entitled to assume on that appeal that the only question presented to the Court here for decision on the declaration, plea, and demurrer was whether these Mississippi statutes and decisions would govern the rights of the parties to the contract of suretyship sued on, or

whether they were to be governed by the laws of Tennessee, since the limitation in controversy would be unenforceable under the statutes and decisions of the state of Mississippi, if applicable, without regard to whether or not the limitation constituted a condition precedent to liability under the laws of Tennessee. Neither do the briefs, as officially reported in the case on the former appeal, 169 Miss. 196, 150 So. 205, supra, show that the contention was made therein that the provision in the bond, requiring any claim thereunder to be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, was a condition precedent to liability under the laws of Tennessee; nor is there a Tennessee case cited in the briefs. The only decisions of that Court referred to at all are those listed in the appellant's plea, and they do not sustain the affirmative of that proposition, as will be hereinafter shown. In other words, the sole question presented by the plea and demurrer, and argued in the briefs at that time was the question of whether or not the laws of Mississippi could be integrated into this Tennessee contract. This was the issue presented by the declaration, plea and demurrer, and no other question was properly before the Court for decision.

From that decision the case was appealed to the Supreme Court of the United States, and the sole grounds of error assigned were:

"The Supreme Court of Mississippi erred in holding, that under section 5131 of the Mississippi Code of 1930 the bond or policy of insurance sued upon, made and to be performed in Tennessee, was to have been deemed to have been made in Mississippi and solvable under the laws of Mississippi because upon an interest in Mississippi, and therefore under section 2294, Mississippi Code of 1930, the provision of said bond of policy that claim thereunder must be made upon the surety within fifteen months after termination of the suretyship, valid under the Laws of Tennessee, was null and void because in conflict with the limitation on actions upon such contracts prescribed by the laws of Mississippi, in that said statutes in such construction and ap-

plication were made repugnant to Article IV, Section 1 and Section 1 of the 14th Amendment to the Constitution of the United States.

2. "The Supreme Court of Mississippi erred in holding that the bond or policy sued upon was upon an interest in the state of Mississippi."

The Supreme Court of the United States thereupon reversed the decision of this Court, and remanded the cause for further proceedings not inconsistent with its opinion. Hartford Accident & Indemnity Co. *v.* Delta & Pine Land Co., 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928. Upon such remand the Supreme Court of this state remanded the case to the Circuit Court of Bolivar County, without any further opinion.

(1) The question at issue before the United States Supreme Court is clearly indicated in the syllabi of the case, as being a federal question only. See 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, as follows:

"A state may, without violating the due process clause, limit or prohibit the making of certain contracts within its own territory; but cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made.

"2. A state may not, in an action based upon a contract lawful where made and operative, enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.

"3. A state may not, without violating the due process clause of the Federal Constitution, apply to an employee's fidelity insurance contract, entered into in another state, its own statute annulling any contractual limitation of the time for giving notice of claim, although the default occurred after the removal of the insured and his defaulting employee to the state in which the action is brought."

(2) Moreover, the jurisdiction of that court was necessarily confined to the federal question presented by the appeal, that is to say, whether the Supreme Court of Mississippi had erred in holding that the Mississippi statutes referred to, instead of the laws of Tennessee, should govern this contract made in Tennessee. Judicial Code, Sec. 237, as amended, 28 U. S. C. A. Sec. 344, Simpkins' Federal Practice 3rd Ed., section 953, page 283, Brinkerhoff, etc., Co. *v.* Hill, 281 U. S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107, 1113. Most assuredly, the issue of whether a provision in a contract of indemnity requiring a claim of loss to be made within a specified time, was a condition precedent to liability could not be deemed a federal question. Having determined that the bond sued on was a Tennessee contract by virtue of having been executed and delivered in that state, and was not changed into a Mississippi contract by virtue of our statutes and decisions because of the fact that the defalcations occurred here where the services of the employee were being rendered, and that therefore the laws of Tennessee should have been applied by the state court in determining the effect of the provision of the contract, the non-compliance with which was set up in the plea of the indemnity company as a defense, it is to be assumed that the Supreme Court of the United States in so holding and in remanding the case for further proceedings had in contemplation that the plaintiff in the trial court would be required to reply to the plea, since its demurrer thereto had been held to be without merit, and that both the trial court and this Court would then be called on for the first time to construe and apply the laws of Tennessee in deciding whether a compliance with the provision set forth in the plea constitutes a condition precedent to liability.

It is true that this Court on the former appeal, 169 Miss. 196, 150 So. 205, 206, supra, when the appellee therein was relying solely on the issue raised by its demurrer, the grounds of which are hereinbefore fully set forth, erroneously assumed and stated that: "It is to be conceded that under the adjudicated decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notice of fifteen months is a limitation of liability and not a limitation

of action"; and that the Supreme Court of the United States, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, supra, seemed to have been thereby caused to make the same assumption, without either court having discussed in their respective opinions the Tennessee decisions mentioned in the plea, and where the only issue raised by the plea and demurrer, or argued in the briefs, was the federal question of whether the law of Mississippi or that of Tennessee should govern the rights of the litigants. In other words, the demurrer, as appears from the grounds assigned therein, raised the sole question of whether or not the Tennessee decisions had any application, and did not present the question of the interpretation of the meaning and effect of those decisions. The demurrant was entitled to have determined the question of whether the laws of Tennessee should be applied before being required to argue what effect should be given to the laws of that state when applied. The appellant Indemnity Company recognized that the sole issue presented to the state Court on the former appeal was whether the Mississippi statutes and decisions could be integrated into what, according to its contention, was a Tennessee contract, as shown by its brief, 169 Miss. on pages 197 and 198, 150 So. 205 of the reported case on the former appeal.

It was held in the recent case of McGoldrick, Comptroller of the City of New York, *v.* Compagnie Generale Transatlantique, 60 S. Ct. 670, 672, 84 L. Ed. —, decided by the Supreme Court of the United States on March 25, 1940, that: "It is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon the courts below. Blair *v.* Oesterlein Co., 275 U. S. 220, 225, 48 S. Ct. 87, 88, 72 L. Ed. 249; Duignan *v.* United States, 274 U. S. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996." And, in the course of its opinion, the Court further stated: "In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erro-

neous and error is not to be predicated upon their failure to decide questions not presented." The question of whether or not the requirement of the bond in controversy was a condition precedent to liability, under the Tennessee decisions, not having been presented by the demurrer, or argued in the briefs on the former appeal, should not be deemed to have been decided by the state Court when it affirmed the judgment of the trial court in sustaining the demurrer; but rather that the Court merely assumed that the proposition was to be conceded in the absence of an argument by the appellee to the contrary—an argument which the appellee was not required to make until after the federal question presented by the demurrer should have been first disposed of adversely to its contention, since a favorable decision in all the courts sustaining the demurrer would have rendered immaterial the decisions of the Tennessee Court on the question of whether the provisions of the bond involved was a condition precedent under the laws of that state.

The ultimate decision reached having been adverse to the contention of the appellee on the federal question involved, he was then required for the first time to reply in the trial court to the plea which invoked the limitation of fifteen (15) months within which the claim for loss was to be filed, by pleading as an affirmative defense thereto that the limitation was neither made a condition precedent to liability by the terms of the contract, nor was there a forfeiture provided for in the bond, in event of failure to comply therewith.

(3, 4) The pertinent provisions of the fidelity bond in question are fully set forth in the opinion of this Court on the former appeal, 169 Miss. 196, 150 So. 205, supra, reference to which is here made to avoid the necessity of again reciting the same in detail; and from which it will be observed that the only conditions precedent to liability is that a loss be sustained, that the claim and proof of loss be filed with the home office of the Indemnity Company, and that the suit be filed within twelve months (12) after the making of the claim, and the filing of the proof of loss.

These conditions were all duly complied with, and the failure to comply with the condition requiring the *claim* to be made within the fifteen months prescribed, only served to postpone, the time for bringing the suit, and did not forfeit the right to recover a loss, provided the claim and proof of loss were submitted before the suit was filed, since a compliance with the latter provision was neither made a condition precedent to liability by the terms of the contract, nor was a forfeiture provided for therein for failure so to do, and one of which provisions must be either expressed or clearly implied from the terms employed, according to the decisions of the Supreme Court of Tennessee, in order to make a failure to comply with such a provision a condition of liability. Continental Fire Ins. Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916; Johnson *v.* Scottish Union Ins. Co., 160 Tenn. 152, 22 S. W. 2d 362; Smithart *v.* John Hancock Mutual Life Ins. Co., 167 Tenn. 513, 71 S. W. 2d 1059; City of Bristol *v.* Bostwick et al., 146 Tenn. 205, 240 S. W. 779; Guthrie *v.* Conn. Indem. Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Co. *v.* Royal Indem. Co., 140 Tenn. 438, 205 S. W. 128; Blackman *v.* United States Casualty Co., 117 Tenn. 578, 103 S. W. 784. It is true that these cases hold that such a provision is legal and valid. However, the question here is not whether it is lawful, but what is its effect under the Tennessee decisions when given validity.

The same rule applies under the Mississippi decisions; Fidelity & Depos. Co. *v.* Merchants' & Marine Bank, 169 Miss. 755, 151 So. 373, 154 So. 260; American Nat. Ins. Co. *v.* Waters, 133 Miss. 28, 96 So. 739; Employers' Liability Ass. Corp. *v.* Jones Co. Lbr. Co., 111 Miss. 759, 72 So. 152; and under a decision of the Supreme Court of appellant's domicil, Elberton Cotton Mills *v.* Indemnity Ins. Co., 108 Conn. 707, 145 A. 33, 62 A. L. R. 926; also, 5 Joyce on Insurance, sections 3282, 3283, and 2nd Ed. 548, 33 C. J. 14, section 661, 14 R. C. L. 1327, section 501, Cooley's Briefs on Insurance, 2nd Ed. vol. 7, section 1338 (a).

In the case of Continental Fire Ins. Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119, 122, 64 A. L. R. 451, 105 Am. St. Rep. 916, the suit was against a fire insurance company for a fire

loss. The policy provided, among other things, that: " 'If fire occur the insured shall * * * within sixty days after the fire, unless such time is extended in writing', make proofs of loss. * * * 'No suit or action on this policy for the recovery of any claim, shall be sustainable * * * until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire.' " The Court said:

"No forfeiture is provided for in the policy for failure to furnish the proofs of loss within 60 days next after the fire, although there are many other acts referred to in the policy and omissions also referred to therein, for which forfeitures are provided.

"In the present case the proofs of loss were furnished within 69 days after the fire, but not within 60 days. The suit was not brought until the expiration of 60 days from the filing of the proofs of loss, and it was brought within 12 months after the fire."

"The rule laid down in Joyce on Insurance applicable to this state of facts is as follows: 'If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some other time prior to commencing the action upon the policy. And this has been held to be true even though the policy provide that no action can be maintained until after a full compliance with all the requirements thereof.' "

The Whitaker case is directly in point. To the same effect is the case of Johnson *v.* Scottish Union Ins. Co., 160 Tenn. 152, 22 S. W. 2d 362, decided on December 23, 1929. The other Tennessee cases hereinbefore mentioned either expressly made compliance with the provisions in question a condition precedent to liability, or provided for a forfeiture

on failure to comply with the same. And in the case of Blackman *v.* United States Casualty Co., 117 Tenn. 578, 103 S. W. 784, 785 (relied on by the Indemnity Company in the case at bar), the policy not only made compliance with the provision in question a condition precedent, but further provided that "failure of the insured to comply with any provision or condition herein shall forfeit all rights to indemnity."

Under all of the Tennessee decisions referred to in any of the briefs of counsel, the failure to comply, with similar requirements had not been held to defeat liability unless compliance therewith is made a condition precedent thereto, or unless a forfeiture is provided for.

This rule is recognized in 33 C. J. 14, section 661, where it is stated: "If giving notice and furnishing proofs in such time are made conditions precedent to liability on the part of the company, or if a forfeiture is provided for if they are not given in the time fixed, notice and proofs must be given as and when specified in the policy or no recovery may be had, and additional proofs furnished long after the time required by the policy cannot be considered. The courts, however, are reluctant to construe provisions requiring notice and proofs of loss as in the nature of forfeitures, and, where the serving of notice or proofs within the specified time is not expressly made a condition precedent to recovery, and no forfeiture is provided for in case of default in service, notwithstanding forfeitures are stipulated for in case of breach of other requirements of the policy, the failure to serve notice or proofs merely postpones the time of payment and the time for bringing suit, and, if notice and proofs are subsequently served, insured or the insurance claimant may recover on the policy notwithstanding his delay, provided of course the time for suing on the policy has not expired."

See, also, 14 R. C. L., section 501, page 1327, where it is stated: "On the other hand many courts take the position that the requirements in a standard insurance policy that the insured shall give notice and make proof of loss within a certain time are conditions precedent to the right to sue, but failure to comply with such requirements within the

time stipulated does not avoid the policy or work a forfeiture in the absence of a stipulation in the policy to that effect. Such failure merely postpones the day of payment, *provided notice is given and proof of loss is made within such time as will enable the insured to bring his suit within the time limited by the policy.* Especially is this true under a policy which requires notice to be given within a specified time but does not expressly provide that a failure to give such notice shall invalidate all claims under the policy, or where notice was in good faith given a broker through whom the policy was procured and the insurer suffers no loss through a delay due to the broker's mistake. Though a forfeiture is not involved by failing to furnish proofs within the time stipulated they must be furnished within a reasonable time or no recovery can be had."

In Cooley's Briefs on Insurance, 2nd Ed., Vol. 7, page 5770, it is stated: "The weight of authority, however, seems to support the rule that neither a provision that the loss shall not be payable until after the stipulated proofs have been furnished, nor, the provision that no action shall be maintainable until after such compliance with the policy, will render the furnishing of proofs within the stipulated time a condition precedent. Rather do such provisions, by their phraseology, indicate an intention that the payment of loss shall be merely postponed until the proofs are furnished. * * * It would seem to follow, as a necessary corollary from the doctrine that delay beyond a stipulated time will only postpone the liability of the company or the enforcement of the claim, that it will be sufficient in such cases that the proofs are given before the bringing of the action."

The case of Continental Fire Ins. Co. *v.* Whitaker, Tenn., supra, is cited as supporting that text.

In Couch's Ency. of Ins. Law, vol. 7, section 1538 (a), it is said: "Nor will a clause providing for a forfeiture for failure to furnish proofs within a specified time be read into a contract, although the policy, in another place, provided that no action shall be brought until after 'full compliance by the insured with all of the foregoing requirements.' In fact, when there is no express forfeiture provision in the

policy, the failure to make proof in the time required thereby merely postpones the time of bringing the suit."

The three Tennessee cases cited by the Indemnity Company in the case at bar in its plea that the failure to present the claim within fifteen months of the termination of the suretyship for the defaulting employee defeated liability, are: Guthrie *v.* Indemnity Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Co. v. Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128; and City of Bristol *v.* Bostwick, 146 Tenn. 205, 240 S. W. 774.

In the Guthrie case the contract of insurance provided (101 Tenn. 643, 49 S. W. 830): "It is expressly understood and agreed that no action shall be maintained nor recovery had for any claim upon or by virtue of this policy after the lapse of one year from the death of said insured, and, if said suit or proceedings for such recovery be not commenced within one year from the date of the death of said insured, it shall be deemed a waiver on the part of all parties concerned of all rights or claims under or by virtue of this policy, and as conclusive evidence against the validity of such claim; and this policy shall be null and void and of no effect, and no person shall be entitled to damages, or the recovery of any money paid thereon."

The contract now before us contains a provision: "No suit, action or proceeding shall be brought by the employer against the surety after the expiration of twelve months after the filing of the proof of loss as above required."

Had this provision not been complied with, the decision of the Guthrie case would preclude a recovery by appellee. But that case has no application here, because the appellee complied with that precedent condition.

In the Phoenix Cotton Oil case, *supra,* the opinion of the Tennesse Court states (140 Tenn. 438, 205 S. W. 129): "But (the contract of insurance) made it a condition precedent of such liability that the former should 'upon the occurrence of any accident covered by this policy give immediate written notice thereof to the company.'" Then the opinion further states that, "By its express terms the giving of immediate notice was made a condition precedent to the right of recovery."

In the case of City of Bristol *v.* Bostwick, supra, the provisions of the policy are not given. Therefore, these three cases are not in conflict with the other decisions of the Tennessee Court, such as the cases of Continental Insurance Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916, and Johnson *v.* Scottish Union Ins. Co., 160 Tenn. 152, 22 S. W. 2d 362, hereinbefore discussed, nor with the views of the text writers and the decisions of other Courts, including this Court, as reflected in the cases of Fidelity & Deposit Co. *v.* Merchants & Marine Bank, 169 Miss. 755, 151 So. 373, 154 So. 260; American Nat. Ins. Co. *v.* Waters, 133 Miss. 28, 96 So. 739; and Employers' Liability Assur. Corp. *v.* Jones Co. Lbr. Co., 111 Miss. 759, 72 So. 152, hereinbefore cited.

The Supreme Court of the United States having held that the law of Tennessee, and not that of Mississippi, governs the rights of the parties, the appellant takes the position that what was said in the opinion of the Supreme Court of the United States on a point which we think was not raised by the demurrer then before the Court, "Is the law of the case and binding upon this Court, right or wrong;" notwithstanding the fact that neither the State Supreme Court nor the United States Supreme Court on the former appeal had occasion to consider other than the federal question raised by the demurrer as to whether our statutes, sections 2294 and 5131 of the Code of 1930, should be integrated into a contract made in Tennessee, or whether the Tennessee decisions should control. When it was held that the law of Tennessee applies, it follows that it then became the province of the Circuit Court of Bolivar county, Mississippi, and of this Court, to determine what the law of Tennessee is as applied to the contract in question; and that for this purpose the case was remanded for further proceedings.

Finally, the Indemnity Company says that under a very recent case, Massachusetts Mutual Life Ins. Co. *v.* England, 171 Tenn. 104, 100 S. W. 2d 982, 983, the Court has held that: "Proofs of claim is a condition precedent to bringing suit. 33 C. J. 74. And this is true even though it is not expressly provided in the policy that furnishing such

proofs is a condition precedent to suit, or that failure to submit proofs shall operate as a forfeiture of benefits." We observe, however, that the Court only held that the right *to bring a suit* is postponed until the proof of loss is furnished whenever such proof is required and is not waived. That case is in line with the other authorities hereinbefore quoted from. But in the case at bar the proofs of loss required by the bond were furnished, before *the suit was filed,* and the suit was filed within twelve months thereafter, as required by the bond sued on. Hence, the question decided in the case last above mentioned is not here involved. There is obviously a vital distinction between a postponement of the right to bring suit and being denied the right to recover at all, because the proofs of loss were filed late.

From the foregoing views, it follows that we are of the opinion that the appellee is not precluded either by the law of the case or the decisions of the Supreme Court of Tennessee from a recovery of the loss sued for, and that the judgment of the court below should be affirmed.

Affirmed.

ETHRIDGE, *Justice* (dissenting):

The general statement of the case is contained in Hartford Accident & Indemnity Company *v.* Delta & Pine Land Company, 169 Miss. 196, 150 So. 205, Miss., 188 So. 539, and in 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928. The case as originally decided in these former hearings, except as reported in 188 So. 539, proceeded to hearing on a demurrer challenging a sufficiency of the appellant's plea, setting up that the case was controlled by the Laws of Tennessee, and that under the laws of that state the giving of the notice within the fifteen months was a condition precedent to liability on the policy. A demurrer raised the legal sufficiency of the declaration, and the full contest over what law controlled and what the effect of the law of Tennessee was, if it controlled, was presented there for decision. Our Court held that the demurrer to the defendant's plea was good, but based its holding upon the

opinion that the Mississippi Law controlled rather than the Tennessee Law. This issue as to which law controlled and the effect in the law of the plea in defense of the action was necessarily before the Court for a decision, and the decision was announced in plain terms that if the Tennessee Law controlled, the plea presented a defense. The briefs in the case were addressed largely to the question of which law applied, and it did not dispute the proposition that if the Laws of Tennessee controlled, the plea presented a complete defense. This is clear from the following language used in 169 Miss. 196, 150 So. 205, 206, in deciding the case: "It is to be conceded that under the adjudicated decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notice of fifteen months is a limitation of liability and not a limitation of action. The converse is true in Mississippi, and the provision is a limitation of the action in this case; our statute of limitation being for six years. Section 2292, Code 1930; Sovereign Camp, W. O. W., *v.* Miller, 125 Miss. 502, 87 So. 892; Standard Accident Insurance Co. *v.* Broom, 111 Miss. 409, 71 So. 653 (and other cases). The cases of Berry *v.* Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445, 145 So. 887, and New York Life Ins. Co. *v.* Alexander, 122 Miss. 813, 85 So. 93, 15 A. L. R. 314, are clearly differentiated from the others cited above, and in the case of Berry *v.* Lamar Life Ins. Co., supra, it is pointed out that the limitation there under review was a condition precedent to the liability imposed upon the insurance company, and not a limitation upon the time in which the action should be brought."

On the appeal from this Court to the U. S. Supreme Court, the matter was also before that Court for decision upon the sufficiency of the demurrer to answer the plea of the defendant. If the plea presented no defense, and if the Laws of Mississippi and Tennessee lead to the same result, the case should not have been reversed, but the decision should have pointed out that the theory under which the Mississippi Supreme Court proceeded was erroneous but that its judgment was correct because the result would be the same—applying either law. It was the duty of the Delta & Pine Land Company, on the hearing of the first

appeal in the Supreme Court of this State, to point out that the Laws of Tennessee, properly understood, would lead to the same result, and that consequently the judgment of the Court should have been affirmed because it would be immaterial as to what reason the court below in its holding sustained the demurrer to the plea of the defendant. It was also its duty to point this out to the U. S. Supreme Court because a litigant should not be permitted to argue one ground of demurrer without arguing other grounds or reasons at the same time. In other words, it should not protract litigation by presenting one ground on one appeal and reserve other grounds for argument on a second appeal. When the U. S. Supreme Court reversed and remanded the case to this Court for further proceeding, not inconsistent with its opinion, it was then the duty of the Delta & Pine Land Company to present to this Court for decision at that time its present contention that the Laws of Tennessee, if applied, would lead to the same result, but it failed so to do and permitted a remand to the court below without raising this contention, acquiescing up to this time in the contention of the Hartford Accident & Indemnity Company that the Laws of Tennessee, if applied, presented a complete defense to the suit. It, on the remand, again contended that the Mississippi Laws still applied on another theory set forth in its first three replications to the defendant's plea. Its first three replications were filed on October 4, 1934, whereas, the fourth, so called, replication was filed March 23, 1938, during the progress of the trial of the case. This fourth replication is not in fact a legal replication at all, but is a mere legal conclusion filed as a plea, without any facts upon which issue could be properly taken which would constitute an issue of fact rather than an issue of law. The plea reads, as follows: "And for another and further replication, leave to file, which having been first obtained, plaintiff says that the contract of suretyship herein sued upon did not make it a condition precedent to liability on the part of the defendant that any claim thereunder must be duly made upon the defendant, the surety, within fifteen months after the termination of the suretyship for the defaulting employee, and said contract of

suretyship did not provide that the same should be forfeited in the event said claim should not be made upon the defendant, the surety, within said period of time, and therefore plaintiff should not be precluded from having and maintaining said suit herein."

The contract upon which the declaration was founded contained all of the stipulations with reference to the notice to be given of default within fifteen months after the termination of the policy of indemnity or insurance. A legal effect of the contract, of course, was presented for decision in the plea to the declaration, and the demurrer to the plea of the defendant and the fourth so called replication at most could only be given the effect of a demurrer to the plea of the defendant. It presents nothing new. The issue it undertakes to present now was squarely on the face of the record when the demurrer to the plea of the defendant was originally filed and sustained. It seems to me to be an intolerable condition to allow a demurrer to a plea to be dealt with as to the sufficiency of the plea by piecemeal. The whole question presented by the demurrer and the plea should have been presented on the former hearing. Furthermore, I think that the U. S. Supreme Court, in its decision, supra, considered the Laws of Tennessee applied to and controlled the policy stipulations. The Court, in discussing the case, at page 149 292 U. S., at page 636 of 54 S. Ct., at page 1181 of 78 L. Ed., 92 A. L. R. 928, said:

"A state may limit or prohibit the making of certain contracts within its own territory (Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (5 Inters. Com. Rep. 610); Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 565, 19 S. Ct. 281, 43 L. Ed. 552 (555, 556); New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 398, 399, 20 S. Ct. 962, 44 L. Ed. 1116 (1123, 1124)); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made (New York L. Ins. Co. *v.* Head, 234 U. S. 149, 34 S. Ct. 879, 58 L. Ed. 1259; Ætna L. Ins. Co. *v.* Dunken, 266 U. S. 389, 399, 45 S. Ct. 129, 69 L. Ed. 342, (349)). Nor may it in an action based upon such a contract enlarge the obligations

of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Ins. Co. *v.* Dick, 281 U. S. 397, 407, 408, 50 S. Ct. 338, 74 L. Ed. 926 (933, 934), 74 A. L. R. 701.

"It is urged however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events, loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. * * *"

It is perfectly clear from this language that the U. S. Supreme Court addressed its mind to the contract and determined that it was controlled by the Laws of Tennessee, that it was lawful in Tennessee; and that the controlling stipulation, with reference to the giving of the notice within fifteen months after the termination of the suretyship guaranteeing the fidelity of the employee were of substantial importance under the Laws of Tennessee. The parties presented their contention to the Supreme Court of the United States, as it did to the Supreme Court of this State, upon the theory that if the Tennessee Laws controlled, the plea of the defendant presented a complete defense to the action. Therefore the decisions of the U. S. Supreme Court and our Court constitutes the law of the case and should be applied regardless of whether it was technically correct or not, because, when the Court has

once heard parties in the same cause of action, and solemnly decided the controversy, it should not, without the gravest necessity, change the rule announced in a former decision. It is true that neither the Laws of the United States nor of Mississippi deprive the Court of the power to change its decisions if it is fundamentally wrong and results in great mischief, but it will not ordinarily reexamine what has once been solemnly decided. See Brewer et al. *v.* Browning et al., 115 Miss. 358, 76 So. 267, L. R. A. 1918 F, 1185, Ann. Cas. 1918 B, 1013, so holding; and suggestion of error overruled in Id., 115 Miss. 358, 70 So. 519, L. R. A. 1918 F, 1185, Ann. Cas. 1918 B, 1013; and Mutual Life Insurance Company of New York *v.* Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. Ed. 788. The doctrine of the law of the case is not treated as a limit on the powers of the Court to overrule a former decision in the same case, but that as a matter of practice and policy, it will not ordinarily do so. See Remington *v.* Central Pacific Railroad Company, 198 U. S. 95, 25 S. Ct. 577, 49 L. Ed. 959; also, 22 Harvard Law Review 438; 34 L. R. A. 321; Ann. Cas. 1918 B, 1013.

I therefore think that the law of the case should be applied and judgment of the court below reversed and dismissed. However, the Laws of Tennessee, properly understood, in my opinion, make the failure to give notice under the contract within the stipulated time after the termination of the policy a complete defense to an action brought thereafter; where, as in the present case, there is no contrary provision in the stipulations of the policy calling for specific provisions or making the specific provision by a contract that failure to give one notice would forfeit, and a failure to give notice under another provision of the same policy no stipulation of forfeiture was stipulated. The decisions in Guthrie *v.* Indemnity Association, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Company *v.* Royal Indemnity Company, 140 Tenn. 438, 205 S. W. 128; City of Bristol et al. *v.* Bostwick et al., 146 Tenn. 205, 240 S. W. 774, hold that such conditions or limitations in such contracts are valid and binding, and the said contract of

suretyship contained in the present insurance contract makes the giving of the notice within fifteen months a condition precedent to liability. The policy here involved had its own provision about the time within which suit should be brought after notice was given; and that, of course, is a contract limitation on the time in which suit may be brought. The provision for giving the notice of the default within fifteen months from the termination of the employment, the fidelity of which was insured by the contract, is a contract limitation on liability, and is founded in good reason, and is lawful in Tennessee. It is stated in the case of Massachusetts Mutual Life Insurance Company *v.* England, 171 Tenn. 104, 100 S. W. 2d 982, 983, decided in 1937, that the furnishing of such information is a condition precedent to liability. The object and purpose of the two provisions in the present contract are different, and were embraced in the policy for different purposes. The object of the giving of the notice of the default within fifteen months of termination of the insurance contract was to enable the insurance company to have the opportunity to make an investigation while the facts were obtainable and to take appropriate action to protect its interest, and to recover from the employee insured, if possible, the amount it would lose by its fidelity policy. It is said in the case of Massachusetts Mut. Life Ins. Company *v.* England, supra:

"'The object of the notice is to acquaint the company with the occurrence of the loss, so that it may make proper investigation and take such action as may be necessary to protect its interests.' 33 C. J. 16.

"'The object of the proofs is to furnish the company with the particulars of the loss and all data necessary to determine its liability and the amount thereof.' 33 C. J. 17.

"With hundreds of claims coming in daily, a large insurance company would have a considerable portion of its income expended in court costs and attorney's fees if a claimant could institute suit against it without giving it an opportunity to investigate and determine its liability, and the parties have contracted that the insurer shall have such privilege before suit is begun."

The apparent conflict in the decisions of the Supreme Court of Tennessee is due to the difference in verbiage of contracts. In some of the cases, a contract of insurance specifically declared a forfeiture and non-liability if proof was not furnished within the time specified in such provision; while in other conditions in the same policy, there was no such stipulation of forfeiture for non-compliance. Of course, where a policy contains such provisions with different verbiage, it would be held, as was held in Tennessee, that, stipulating forfeiture in a particular provision while not stipulating forfeiture in a similar provision or condition, it was not the intention of the parties to forfeit for non-compliance in conditions where no provision for forfeiture was contained in the policy. The Court also said, in the case of Massachusetts Mut. Life Ins. Company *v.* England, supra, that the furnishing of such proof is a condition precedent. In some of them a condition precedent to bringing suit. In others a condition precedent to liability. When the language of the contract here involved is set down, it is manifest that it was the intention of the policy to require the notice of the default within the period stipulated, as a condition precedent to liability, and not as a condition for bringing suit. The purpose of such a provision plainly is that the insurance company may have an opportunity to investigate promptly the facts while they are obtainable and while witnesses are available. It is a reasonable stipulation—conducive to fair dealing—and is not prohibited by any Statute of Tennessee.

I do not deem it necessary to take up and analyze the various cases cited in the majority opinion, for, in my opinion, when all of them are examined, and the facts distinguished, all are consistent with the theory that the stipulation for giving notice was a condition precedent to liability. In the case at bar, the facts could have easily been discovered had the books and records of the Delta & Pine Land Company been audited and the vouchers examined in the offices of the company and at the bank where its deposits were made. I think, therefore, that judgment should be reversed and the suit dismissed.

As said in the headnote of the case of Berry *v.* Lamar Life Ins. Company, supra, the "Court will enforce insurance contracts according to their terms, if not prohibited by law or public policy." In the opinion, the Court said: "The life insurance business has become one of the most extensive businesses in the country, and such business depends almost entirely upon contracts. The power to make such contracts as the parties desire to make, when not prohibited by law or public policy, is a fundamental principle of the life insurance business, and is essential to its successful conduct." Of course, the same can be said of all kinds of insurance contracts. The State, under its police power, has extensive authority to regulate insurance and insurance contracts and may prohibit certain types of stipulations in policy contracts, but where there is no prohibition, the parties are free to make their own contracts. The liberty of contract is one of the most important and most essential of all the rights of citizenship. Under the law, as it now exists, corporations have the right to make contracts when not prohibited by law; and, the courts are bound by the contract of the parties where the law has not prohibited or regulated them so as to destroy or mitigate certain types of contracts. The courts must enforce the law as they find it and not as the exigencies of particular cases may seem to make desirable from any standpoint of personal conceptions of justice. Courts are not lawmakers and have no right to invade the rights of the citizenship except as authorized by law.

No. 158. BADER *v.* ILLINOIS. Appeal from the Supreme Court of Illinois; and

No. 189. HARTFORD ACCIDENT & INDEMNITY CO. ET AL. *v.* DELTA & PINE LAND CO. Appeal from the Supreme Court of Mississippi. October 14, 1940. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeals were allowed as petitions for writs of certiorari, as required by § 237 (c) of the Judicial Code (43 Stat. 936, 938), certiorari is denied. *Mr. Wm. Scott Stewart* for appellant in No. 158. *Mr. Wm. M. Hall* for appellants in No. 189. *Messrs. John E. Cassidy,* Attor-

ney General of Illinois, and *A. B. Dennis*, Assistant Attorney General, for appellee in No. 158. *Messrs. Marcellus Green* and *Garner W. Green* for appellee in No. 189. Reported below: No. 158, 372 Ill. 345; 23 N. E. 2d 691; No. 189, 189 Miss. 496; 195 So. 667.